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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

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Petitioners WAYNE MINNICK, HENRY J. DARDEN and the CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION[1] respectfully pray that a Writ of Certiorari issue to review the decision rendered by the California Court of Appeal, First Appellate District, Division Four, entered in this case on July 27, 1979 as modified on August 23, 1979.

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[1]The California Correctional Officers Association (hereinafter referred to as "CCOA"), is a recognized agent of correctional officers and other employees of the California Department of Corrections, pursuant to California Gov. Code §§ 3525, *et seq.*, for purpose of representing them in all matters relating to employment conditions and employer-employee relations. (Findings of Fact, App. F, p. 2).

OPINIONS BELOW

The opinion of the California Court of Appeal (App. A *infra*) is reported at 95 Cal.App.3d 506. A modification of the opinion and a denial of a petition for rehearing (App. B, *infra*) is reported at 96 Cal.App.3d 626a. The order denying your petitioners' Petition for Hearing before the California Supreme Court (App. C, *infra*) is not reported. The opinion of the trial court (App. D, *infra* under the caption "Notice of Intended Decision"), its judgment (App. E, *infra,* under the caption "Judgment and Declaratory Judgment"), its Findings of Fact and Conclusions of Law (App. F, *infra*), and its Permanent Injunction (App. G. *infra*) are not reported.

JURISDICTION

The opinion of the California Court of Appeal, First Appellate District, Division Four, was filed on July 27, 1979. That court's order, denying your petitioners' Petition for a Rehearing and the accompanying modification of the initial opinion, was filed on August 23, 1979. A petition for a hearing by the California Supreme Court was filed in a timely fashion on September 5, 1979, and was denied by the California Supreme Court on November 8, 1979 (Appendix C). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a state agency may, absent proof that it has engaged in previous intentional discrimination, voluntarily establish goals, set aside positions and grant preferences, for the hiring and promotion of less qualified

minorities and women, to the detriment of all other applicants and employees.

2. Whether the safe and efficient operation of correctional facilities constitutes a sufficient compelling interest to justify the use of racial and sex-based preferences in hiring and promotion, and if so, whether proof of that interest was sufficiently supported by the record.

3. Whether it is sufficient for a state agency to adopt preferential employment practices based solely upon conclusory allegations of the discriminatory impact of its past policies and practices on minorities and women.

4. Whether it is appropriate for a state correctional institution to institute employment goals for minorities based upon inmate population rather than the relevant labor market or applicant flow.

5. Whether the relevant labor force for the hiring of women should be based on state-wide employment statistics for women as opposed to applicant flow or the labor force statistics for women in the relevant geographic area in which the institutions are located.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are: U.S. Const. Amend. XIV; 42 U.S.C. §§ 1981, 1983 and 2000(e), *et seq.;* Calif. Const. A. I, §§ 7 and 8; Calif. Labor Code §§ 1410, *et seq.,* and Calif. Gov. Code § 50084, all of which are set forth *seriatim* in Appendix H.

STATEMENT OF THE CASE

I

INTRODUCTION

This is an action brought by two Caucasian male employees, and the CCOA, a recognized bargaining agent for correctional officers and other employees of the California Department of Corrections (hereinafter referred to as "the Department"). The Department voluntarily developed and implemented an affirmative action plan (hereinafter "AAP") and granted preferences to minorities and women in the absence of proof of any prior discrimination. The objectives of the AAP were twofold: 1) attaining a percentage of various minority groups in the Department's work force to reflect their percentage in the inmate population, and 2) attaining a percentage of women in the Department's work force to reflect their percentage in the total California state labor force. Employment preferences were granted to attain goals contained in the AAP. In furtherance of the goals, certain positions were set aside solely for minority and female applicants and employees. The rights of all other applicants and employees, secured by the Fourteenth Amendment, are violated by these policies and practices.

Petitioners believe that immediate review of the issues raised herein is important to the national interest insofar as immediate guidance is needed for thousands of public employers and many times that number of employees around the country. It is necessary for this court to resolve the tension created by *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), which permitted the

limited use of preferences based in admissions policy based on race in state higher educational institutions and *Weber* [*United States Steel Workers of America, AFL-CIO v. Weber, et al.*, ... U.S. ....., 99 S.Ct. 272, 61 L.Ed.2d 480 (1979)], which permitted private employers to voluntarily adopt AAPs absent a showing of prior discrimination, in light of *Washington v. Davis,* 426 U.S. 229 (1976), which requires public entities to show that they had engaged in prior intentional discrimination before imposing race-conscious remedies.[2]

II

STATEMENT OF FACTS

The California Department of Corrections voluntarily adopted an affirmative action program in 1974. Despite the binding disclaimer that it had engaged in any past intentional discrimination,[3] the Department adopted and imple-

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[2]The need for immediate guidance for California public employers and employees is even more urgent in light of the opinion of the California Supreme Court in *Price v. Civil Serv. Comm.*, which was released at the time that this petition was being prepared for the printer. It is discussed more fully in Reasons for Granting a Writ, section five, *infra,* beginning at page 30.

[3]In response to an interrogatory the Defendants disclaimed having engaged in any prior, intentional discrimination. They also advanced an assertion of "adverse impact" which the California Court of Appeal denoted as the only substantial evidence in the record of past discrimination (App. A, p. 9). The interrogatory and answer are as follows:

"INTERROGATORY 1.

Do you contend for the purposes of this litigation that the Department of Corrections of the State of California, or any of its agents, employees, representatives, officers, officials or other authorized representatives, illegally or improperly discriminated against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment, on the basis of that person's race, color, creed, sex or national origin?

mented the AAP with the stated principal objectives of increasing the number of "minority" employees in the Department to a level equalling at least 70% of any given "minority" in the inmate population of the Department (i.e., state prisoners) and increasing the number of female employees to a percentage equivalent to that in the total California labor force in April, 1970 (App. A, pp. 5-6). Goals were set for specified minority groups, including "Black", "Asian", "Spanish surname", "Native American", and "other extraction." An "overall" goal of 36% minorities employed and 38% women employed was established. The AAP stated that achieving these goals would serve the Department's objective of improving relationships with prisoners and reducing racial conflict and violence in the prison system (App. A, p. 6). Although the percentages of women and minorities to be employed as new hires by the Department were targeted to be attained by July 1979, the objectives of the AAP were to continue indefinitely to apply to all other areas of employment, including promotion, transfer, training and work assignments (App. A, p. 7).

Preferences granted to minority or female employees caused them to be hired, promoted, or transferred, over

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ANSWER

For the purpose of this litigation the Department of Corrections of the State of California does not allege that it has wilfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment on the basis of a person's race, color, creed, sex or national origin. The department does allege, however, that as a result of its past hiring and promotion practices and procedures, there has been an adverse discriminatory impact on certain minorities and the female sex, in terms of initial hiring and also promotion." (CT pp. 121-122).

other more qualified applicants and employees. The record clearly establishes that sex and race were prime factors for these employment decisions. Certain positions were set aside for females or minorities and were labeled "female only" or "minority only" (App. A, p. 8; App. F, p. 4). For example, positions were advertised as "Correctional Sergeant-Minority" (Exhibit 11), "Correctional Counselor I-Female" (Exhibit 12), (R.T. 98-99), "Records Officer I-Minority" (Exhibit 13), and "Correction Lieutenant-Minority" (Exhibit 13). The application for Field Representative stated that applications would be accepted from women only (Exhibit 6, p. 6).

Even where positions were not reserved by title to minorities or females, the intention to fill positions with minorities and females officially was made clear by management personnel and their agents, including oral interview panelists, superintendents of institutions, and the Director of the Department himself (Exhibit 1, RT 39; Exhibit 3, RT 55-56; Exhibit 6, p. 1). Employees were told that because of their race or sex they need not apply or would not be considered, for employment positions (RT 50, 69-70, 119-121, 129, 150-151). One officer was instructed not to consider Caucasian candidates in hiring clerical workers, and the Department downgraded positions to obtain sufficient minorities to fill those positions (RT 170, 700, 715). In a memo, that officer questioned why he should even interview white applicants "knowing that institution policy is to hire only minorities until a selective quota is met" (Exhibit M). In yet another instance, in reply to a grievance filed by a Caucasian male, the Department Director told him he was "sorry, but that affirmative

action was something we all had to deal with and several of us would have to pay the price for it . . ." and that the Caucasian male was one person who would be paying the price (RT 151-152).

III

PROCEDURAL STATUS

On December 30, 1975, petitioners Wayne Minnick, Henry J. Darden and CCOA brought this action in the Superior Court of the State of California in and for the City and County of San Francisco (CT, p. 1). The Amended Complaint, filed on February 10, 1976, alleged that the California Department of Corrections granted preferences based on race and sex in hiring, promotions and other terms and conditions of employment, to the detriment of other applicants and employees who were passed over because of their race or sex. The petitioners alleged that such use of race or sex as a factor, or the sole factor, in employment decisions violated rights under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§ 1981, 1983, and 2000(e), *et seq.*, and various California constitutional and statutory provisions (CT pp. 63-81).

On October 12, 1977, following a non-jury trial, a Judgment and Declaratory Judgment and a Permanent Injunction in favor of petitioners in this action were entered (App. E and G). The respondents Department of Corrections and Director Enomoto filed a notice of appeal on October 14, 1977, and subsequently sought a writ of supersedeas from the California Court of Appeal. The Court of Appeal entered an order staying enforcement

of the Judgment and Permanent Injunction during the pendency of the appeal (App. B, p. 15). The California Court of Appeal entered its decision overturning the trial court. Petitioners applied for a hearing and were denied a hearing by the California Supreme Court on November 8, 1979, as described *supra* at page 2.

IV

PARTIES

CCOA did not agree with the AAP and actively opposed it, as is clear by its participation as a party to this lawsuit. Petitioners Minnick and Darden were denied promotion in deference to female or minority candidates (App. A, p. 7), as were various other employees (App. A, p. 7). CCOA fairly and adequately represented the interests of all members disadvantaged by said practices (Finding of Fact 3, App. F, p. 2). Members of CCOA, including petitioners Minnick and Darden, will be affected by future implementation of the AAP with respect to job opportunities (Finding of Fact 14, App. F, p. 5).[4] CCOA, of course, had standing to bring the action under the doctrine of *Allee v. Medrano*, 416 U.S. 802 (1974), *Professional Firefighters Inc. v. City of Los An-*

[4]The trial court found that petitioners Minnick and Darden were not entitled to monetary damages and denied a motion to certify a class. However, the court accepted a stipulation by the parties that the standing of CCOA, Minnick and Darden would not be affected with respect to declaratory and injunctive relief ordered by the court, and issued an order to that effect (CT 1194-1195). Furthermore, the stipulation only carried out what the record has reflected—that correctional officers who were certifiable within the "rule of three" had been passed over and had testified that they were willing to be amended into the action as plaintiffs-petitioners (R.T. 7-14). Such amendments would have been timely and proper under California law, at the time the stipulation was accepted.

geles, 60 C.2d 276 (1963) and *IAFF v. City of Palo Alto,* 60 C.2d 295 (1963).

The complaint named as defendants the respondents, California Department of Corrections and Jiro J. Enomoto in his representative capacity as the Department's Director. Judgment was not taken against the other defendants, California State Personnel Board, and Carlos Sanchez, a Deputy Director of the Department of Corrections.

V

TRIAL COURT DECISION

The trial court held that the defendants' use of sex or racial background or ancestry as a factor, or the sole factor, in selecting applicants for employment and in promoting employees was unconstitutional and void (App. D). A judgment was issued to the effect that by discriminating in hiring and promotions, the Department and its Director were violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.,* Article I, §§ 7 and 8 of the California Constitution, 42 U.S.C. §§ 1981 and 1983, California Labor Code §§ 1410, *et seq.,* and California Government Code § 50084. Additionally, the judgment found the arbitrary and capricious nature of the racial categorization process to violate substantive and procedural due process guaranteed by the United States Constitution and Article I, § 7 of the California Constitution (App. E, p. 2).

Pursuant to the judgment, the Permanent Injunction enjoined the defendants and their agents from granting

any preference, advantage or benefit on the basis of race, color or national origin in *hiring or promotion,* but excluded from its prohibition the use of race or sex as relevant factors in the determination of *assignments and job responsibilities* of employees in the Department, and provided for "male only", "female only" and bilingual certification for positions where the job-relatedness of requirements could be objectively demonstrated (App. G, p. 2).

The judgment was supported by the Findings of Fact. The Court found that the Department's discrimination was, at least, in part motivated by the AAP which caused preferences to be granted on the basis of race or sex and not solely on the qualifications or merits of the individual (Finding of Fact 8, Exhibit F, p. 3-4). Although the trial court recognized long standing discrimination against minorities and women by our society, it found that the preferential employment practices in question were not justified by, nor did they remedy, such past wrongs and found that such preferences acted to the detriment of innocent employees of the Department (Finding of Fact 13, Exhibit F, p. 5). In addition to lacking a nexus between the use of race and sex and any past discrimination by society, the plan and resulting preferences were found to be arbitrary and capricious since the program was devoid of scientific or objective standards for classifying people into racial categories, and had no dispute-resolution or complaint procedures for such categorizations (Finding of Fact 16, Exhibit F. p. 6). However, the trial court found that the Department could consider the race and sex of an employee as a factor in job *assignment* and job *responsibil-*

ities, in contrast to job *opportunities,* to serve a "state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tension, and furthering orderly and efficient prison management" (Finding of Fact 19, App. F, p. 6). Thus, two distinct Conclusions of Law were entered, one finding preferential employment practices unlawful and another allowing the use of race and sex specifically and only as factors in determining job *assignments* and job *responsibilities* (Conclusion of Law, App. F, p. 8).

VI

CALIFORNIA COURT OF APPEAL DECISION

The California Court of Appeal reversed the lower court and held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was not violated. The court concluded that the preferences granted in the AAP and implemented by the state are within the purview of the type of plan permissible under *Regents of the University of California v. Bakke,* (hereinafter "Bakke") 438 U.S. 265 (1978). The Court of Appeal held that there is a compelling state interest in a safe and efficient correctional system to justify such preferences and that such interest is similar to the interest of the state in attaining "ethnic diversity" among its students (App. A. p. 16).

The Court also overturned that part of the judgment based on the trial court's Finding of Fact 16, that racial classifications on the basis of employee surnames, violated substantive and procedural due process rights guaranteed

by the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution. The rationale for so holding was that there was no evidence showing that anyone had ever in fact been misclassified or aggrieved by such misclassification (App. A, p. 26). The respondents were found not to have violated 42 U.S.C. §§ 1981 and 1983 since they merely provide a remedy for Fourteenth Amendment violations (App. A, p. 24). Title VII, 42 U.S.C. §§ 2000(e), *et seq.* (hereinafter "Title VII"), was disposed of on the basis that "the fact that the Department is a public employer suggests no basis for excluding it from the reach of the Congressional intent and objectives analyzed in *United Steel Workers (United Steel Workers of America, AFL-CIO v. Weber, et al.,* (1979) ..... U.S. .....), [99 S.Ct. 272, 61 L.Ed.2d 480]" (App. B, p. 2), (hereinafter "*Weber*"). The court in so doing summarily dismissed issues and failed to address issues raised by the petitioners with respect to the requirements of *Washington v. Davis, supra.* The court clearly erred in looking solely to *Weber* as the applicable governing law. The decision, insofar as it relied on other California constitutional and statutory provisions, was overturned on the basis that these provisions provided no greater rights than those provided by the Fourteenth Amendment to the United States Constitution (App. A, pp. 23, 25).

A. The Court Erred in Holding that the Department's Preferential Employment Practices Did Not Violate the Fourteenth Amendment.

1. The Court's Reliance on Bakke was Misplaced.

Neither the AAP nor the practices of the Department comply with the requirements for a permissible program under Justice Powell's analysis in *Bakke,* which was relied upon by the Court of Appeal. *Bakke* requires the showing of a compelling state interest in using a burdensome classification, showing that the use of that classification is precisely tailored to serve the compelling governmental interest:

> "We have held that in 'order to justify the use of the suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.' " *University of California Regents v. Bakke,* 438 U.S. 265, 305.

In *Bakke,* Justice Powell found a State's interest in maintaining a diverse student body was a "special concern of the First Amendment" of a compelling nature such as to justify taking race into account in admitting medical students (*Ibid.,* at pgs. 311-315). No parallel First Amendment interest in diversity has been found to be appropriate in the employment context, nor has it been advanced as a compelling interest in this case. To date, the use of burdensome racial classifications in the employment context has been upheld solely for the remedying of past intentional discrimination by a public employer. *Washington v.*

Davis, 426 U.S. 229 (1976); *Arlington v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). The Department's stated objective for utilizing racial and sex-based classifications was to "serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence in the state prison system" (App. A, p. 6). The use of such classifications to serve the "operational needs" of a public employer, or to satisfy community preference has been repeatedly rejected, whether the preference inured to the benefit of minorities or non-minorities. *United States v. Scotland Neck City Board of Education,* 407 U.S. 484, 491 (1972); *Monroe v. Board of Commissioners,* 391 U.S. 450, 459 (1968); *Washington v. Lee,* 263 F.Supp. 327 (M.D. Ala. 1966), aff'd *per curiam, Lee v. Washington,* 390 U.S. 333 (1968); *Cooper v. Aaron,* 358 U.S. 1 (1958); *Brown v. Board of Education,* 349 U.S. 294, 300 (1954); *Baker v. City of St. Petersburg,* 400 F.2d 294 (5th Cir. 1968); *Smith v. Board of Education of Morrilton School Dist., No. 32,* 365 F.2d 770 (8th Cir. 1966). Moreover, the analogous notion that minority doctors are better able to serve minority communities was rejected as sufficient justification for the use of racial classifications by the United States Supreme Court in *Bakke, Id.* 438 U.S. 265, at 311.

Moreover, even if the state's purported interests were found to be compelling, the preferences granted fail to comport with the requirements set forth by Justice Powell, as relied upon by the Court of Appeal. Under Justice Powell's analysis, race or ethnic background may be used as a "plus" in an applicant's favor if (1) this does not

insulate individuals from comparison with all other candidates for available positions and (2) candidates without the "plus" are not totally excluded from fair and competitive evaluation from a specific percentage of positions. (*Bakke, Id.* at 316-319). We do, however, contend that even the above *Bakke*-type of preference is not constitutional in the employment context.

The Department's AAP failed to qualify under both above-described prerequisites. The Court of Appeal itself recognized that Caucasians and males were totally excluded from a specific percentage of positions when it indicated that the stated goals of the Department were to attain a level of minority employees equalling at least 70% of every given minority in the inmate population (translating into a goal of 36% overall minority employment), and to employ women in 38% of its positions (App. A, p. 6). The evidence clearly demonstrates that minorities and women were insulated from comparison with all other candidates for available positions (see Statement of Facts, pp. 7-8). Additionally, the court ignored its own characterization that such was the case:

> "Some of these positions were labelled 'female only,' or with words similarly referring to sex (including 'male only') or to race or ethnic background." (App. A, p. 8).

2. The Court of Appeal Failed, In Fact, to Apply Strict Scrutiny In Reviewing and Approving the State's AAP.

The Department failed to show that use of racial and/or sex based classifications served a permissible interest

(serving the "operational needs" of the Department) and also failed to show that the use of these classifications was necessary for, or related to, the accomplishment of the purported interest.

The Court concluded that, after applying the standard of "strict scrutiny" required under *Bakke,* preferences in promotions and transfers of certain ethnic groups and women served the compelling interest of the State in "the proper management of its correctional system" (App. A, p. 21). The extent of "scrutiny" employed in overruling the trial court's findings consisted entirely of the following casual and conclusory remark:

> "The AAP indicated, and there was evidence, that the desired 'minority' level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." (App. A, p. 6).

The AAP did not indicate that a "desired 'minority' level" would serve "inmate-related objectives of the Department", nor was there any evidence to support that proposition. The court's modification of its opinion deleted the assertion that the AAP indicated any relationship between a desired minority level and the Department's objectives (App. B, p. 1), and set forth none of the supposed evidence to establish this important nexus. The substantial evidence was to the contrary, that there was no nexus between obtaining a proportional relationship between the race of the inmate population and that of employees, and the reducing of racial tensions, etc. (RT 585-586, 748-757). The evidence was that the per-

sonal behavior of the officer toward inmates, rather than his/her race, was determinative (RT 754-755). The Court of Appeal failed to advance any evidence to overturn the trial court's findings and conclusions that racial and sex based preferences in *hiring and promotion* were discriminatory (Finding 8, App. F, pp. 3-4; Conclusion of Law 4, App. F, p. 8). In fact, the Court of Appeal confused these findings with those establishing the relationship between *job assignments and job responsibilities* and a compelling state interest in "orderly and efficient prison management." (Findings of Fact 19, App. F, p. 6; Conclusion of Law 4, App. F, p. 8).[5]

The Court's "strict scrutiny" amounted to a mere assumption that if the State has a compelling interest in using race and sex in assignments and job responsibilities, then it must have a compelling interest in attaining a stated level of minority representation. A premise that the use of race or sex is permissible in determining job assignments and job responsibilities does not inevitably lead to the Court of Appeal's conclusion that a particular level of minority and female employment is necessary; there was no evidence that there was not already a sufficient number of minorities to fulfill the Department's needs with respect to assignments and responsibilities. Also, evidently, the trial court was correctly applying a more

[5]In this petition, we are not addressing the trial court's conclusion that there may be, in some instances, a compelling state interest in using race or sex for making job assignments and determining job responsibilities. The Court of Appeal confused and misinterpreted the trial court's findings which differentiated an employer's interest in the maximum efficient utilization of its work force as opposed to affirmative action for job opportunities.

rigid scrutiny with respect to employment *opportunities* than it did *assignments*. The courts have differentiated preferences granted with respect to various aspects of employment on the basis of the impact on the employment opportunities of identifiable innocent third parties (with preferences in promotional opportunities receiving the most rigid scrutiny). *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *cert. den.* 421 U.S. 991 (1975); *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. den.* 429 U.S. 823 (1976); *Chance v. Board of Examiners,* 534 F.2d 993 (2d Cir. (1976) *cert. den.* 431 U.S. 965 (1977); *White v. Carolina Paper Board Corp.,* 564 F.2d 1073 (4th Cir. 1977).

Even in Title VII cases, this court has recognized that racial remedies must be narrowly tailored to rectify the discrimination complained of. *Hazelwood School District v. United States,* 433 U.S. 299 (1977). Thus, if this court were to overlook the respondents' disclaimer of prior intentional discrimination, and were to overturn precedent by holding that disproportionate impact, the mere assertion of disproportionate impact, or judicial notice of societal discrimination suffices as a compelling state interest, the Department's AAP would still fail to pass the test of strict scrutiny, since the preferences granted bear no relation to past employment discrimination. Although the trial court took note of societal discrimination against minorities and women, it found that neither societal discrimination nor discrimination by the Department were advanced as compelling reasons for the adoption of preferential employment practices, and that such practices

were not justified by, nor did they remedy, past wrongs by society against minorities and women (Finding of Fact 13, App. F, p. 5). The Court of Appeal agreed that evidence of past discrimination was "irrelevant" to this case (App. A, p. 28).

Where there is proven past discrimination the law clearly establishes that an appropriate remedy may be fashioned to equalize the relevant labor force statistics of the protected group. *Hazelwood, supra.* In an unprecedented opinion, the California Court of Appeal chose to accept as the benchmark for goals, the inmate population of minorities, rather than the labor force statistics for minority groups. The Court chose to accept statewide employment statistics as the benchmark for goals for hiring and promoting women, as opposed to the applicant flow or labor force statistics of women in the relevant geographic areas in which institutions were located. This not only conflicts with *Hazelwood, supra,* but also it is inconsistent with precedents under Title VII, *supra,* page 15, which prohibit consideration of customer or community preference in employment decisions.

Further evidence that the state failed to narrowly tailor preferences to meet its stated objectives can be found in the Court of Appeal's observation of the casualness of the classification system. Although the Court of Appeal disagreed with the trial court that the respondents had violated procedural and substantive due process rights by having no scientific or objective basis for classifying people in racial categories and no complaint or dispute-resolution procedure, it noted that "the identification of race by surname is somewhat casual and very possibly

inaccurate (e.g., in identifying the race of a woman married to a husband with an Asian surname)" (App.A, p. 20-21). It is apparent that appointment of non-minority females married to individuals with Asian and Spanish surnames would not serve the purported needs of the Department in achieving a racial balance in the work force to reflect the racial composition of the inmate population. The record is devoid of evidence that the racial classifications used were necessary to achieve the articulated state goal. Moreover, this highlights the fact that the Court of Appeal never addressed the question of whether less intrusive means were available to attain the state's purported objectives, as required under *Kramer v. Union School District,* 395 U.S. 621 (1969), and numerous other cases.

B. The Court Erred in Relying On Weber to Hold that the Department's Practices Did Not Violate Title VII.

1. The petitioners are afforded no less protection under Title VII than under the Fourteenth Amendment.

The Court of Appeal erroneously relied upon *Weber,* in holding that the employment preferences of the Department were not violative of Title VII. The Court of Appeal ignored this court's express reluctance to extend the ruling of *Weber,* to the public sector "since the Kaiser-U.S.A. Plan does not involve state action [the] case does not present an alleged violation of the equal protection clause of the constitution." (*Weber, supra,* 99 S.Ct. 2721, 2726, 61 L.Ed. 2d 480, 487).

Title VII should be construed to incorporate the commands of the Fourteenth Amendment, since the 1972 amendments to Title VII, making the act applicable to public entities, were premised upon Section 5 of the Fourteenth Amendment, which provides that "Congress shall have the power to enforce by appropriate legislation the provisions of this article."[6] The view was confirmed by this Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) and numerous appellate courts.[7] Whatever the constitutional basis for the passage of Title VII, Congress could not, in passing the amendments to Title VII, abrogate or limit by statute the petitioners' rights under the Fourteenth Amendment. Thus, "adverse impact" is not sufficient (even if proved) since the Fourteenth Amendment requires prior intentional discrimination to be demonstrated to justify a remedy which imposes racial classifications. *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). See also, *Personnel Adm's of Massachusetts v. Feeney*, 99 S.Ct. 2282, 2292 (1979). As this Court stated in *Arlington Heights, supra*, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." At 264-265.

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[6]See Legislative History, 1972, U.S. Code Cong. & Ad. News 2154; H.R. Rep. No. 238, 92 Cong. 1st Sess. (1971); S. Rep. No. 415, 92 Cong. 1st Sess., 24 No. 11 (1971).

[7]See *United States v State of New Hampshire*, 539 F.2d 227 (1st Cir. 1976), *cert. den.* 429 U.S. 1023 (1976). *C. Usery v. Charleston School District*, 558 F.2d 1169 (4th Cir. 1977) (Equal Pay Act 29 U.S.C. § 206(b); *Usery v. Allegheny Co. Institution District*, 544 F.2d 148 (3rd Cir. 1979).

2. Under Title VII, as under the Fourteenth Amendment, remedies adopted must be the least intrusive upon the rights of innocent parties.

As previously stated, under Title VII, the intrusiveness of remedies on the rights of innocent parties must bear some relationship to the nature and quality of prior discrimination, if any, against a particular group. *Hazelwood, supra.* Blacks are the only minority group granted a preference under the affirmative action plan in *Weber.* Not only did the court take judicial notice of the specific congressional history of Title VII with respect to Negroes,[8] but also the court specifically took judicial notice of the exclusion of blacks from craft unions. 61 L.Ed.2d 480, 486. Here, the California Court of Appeal has completely ignored any differences between the congressional history of Title VII and that of the Fourteenth Amendment insofar as the preferences in this case affect other minorities and women, as opposed to blacks. Certainly those who drafted and passed the Fourteenth Amendment did not contemplate nor intend that minority persons would be better off than non-minorities insofar as treatment by state agencies were concerned.

Furthermore, the *Weber* affirmative action plan was less intrusive than the one in the instant case insofar as it was

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[8]"Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy' 110 Cong. Rec. 6548 (remarks of Senator Humphrey) . . . accordingly it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them', *Ibid.* at 6548 (remarks of Senator Humphrey) and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." 61 L.Ed. 480, 488-489.

negotiated and time-limited and the preferences in *Weber* involved only employment level, and did not involve promotions and the like. One of the reasons this court was able to sanction the racial classifications imposed by the affirmative action program in *Weber* was the fact that "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber, supra,* 61 L.Ed.2d 480, 492. Not only is there no evidence that the Department's AAP is temporary, but all indications are to the contrary. In fact, the plan would not serve the interest it purports to serve if it was only temporary, since the composition of the Department's work force can not continue to mirror the racial proportions of the inmate population, if that population fluctuates. Moreover, even if the proportions of inmates in the inmate population were stable, continued vigilance and adjustment would be necessary, due to fluctuations in the Department work force with respect to both desired levels of employment as well as distribution of minorities and women in promotional positions.

In addition, the *collectively bargained* agreement in *Weber* was less intrusive upon the rights of other employees and their bargaining representative than is the voluntarily imposed AAP of the Department. In reviewing the legislative history of Title VII, the court found that the statute must be read in light of legislators' demands that "management perogatives and union freedoms . . . be left undisturbed to the greatest extent possible . . ." and that "Federal Government interference with private businesses" be minimized. 99 S.Ct., 2721, 2729, 61 L.Ed.2d 480, 491. Consequently, Title VII was designed to create an

atmosphere conducive to voluntary or local resolution of problems caused by discrimination and was intended to act as a "spur or catalyst to cause 'employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'. *Albemarle v. Moody*, 422 U.S. 405, 418 (1975)." 99 S.Ct. at 2728, 61 L.Ed. 480, 489.

Not only was the employment opportunity in *Weber* (training to facilitate the hiring of blacks) inherently less tied to the expectations of employees to promotions in a merit system (see *Chance* and *Kirkland, supra*, p. 14), but the benefit was itself a new one, negotiated by the union for all employees, in return for a modification of the seniority provisions. Under a collectively bargained plan, employees who feel that they have been denied fair representation by the labor organization on the basis of race, have redress against the employee organization. *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192 (1944). Here, the Department's preferential employment plan places the entire burden of any past discrimination by society, or by the employer, on innocent male and Caucasian employees (even assuming that a showing or claim of adverse impact is sufficient). This runs contrary to the concerns expressed in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) and embraced by a strong majority in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 372 (1977). The impact of affirmative action can be shifted and benefits and burdens more easily distributed when a plan is collectively bargained as opposed to unilaterally imposed. Here the preferential practices

were not only not agreed to, but were vehemently opposed by the employee organization involved.

C. The Court Erred in Finding No Violation of California Law.

The California Court of Appeal disposed of the other California constitutional and statutory provisions by holding the United States authoritities to "provide no less individual protection than is guaranteed by California law." (App. A, p. 23). This is true, except with respect to Article I, Section 8 of the Constitution, which has been clearly held by the California Supreme Court to establish a suspect classification, where sex-based categories are concerned, holding them subject to strict scrutiny, and thereby creating greater protection for males than under the federal authorities. *Sail'er Inn v. Kirby,* 5 C.3d 1 (1971).

REASONS FOR GRANTING A WRIT

1. It is important for this court to settle the question of whether a state public employer may grant preferences in hiring and promotion, based on sex or race, where there is no evidence of past employment discrimination. That question remains open after *Weber*, and its resolution is necessary for the guidance of thousands of public employers throughout the country and to inform hundreds of thousands of public employees of all races and both sexes of what expectations they may have with regard to employment opportunities.

This case presents a harder test for the granting of racial or sex-based preferences by an employer than that used in *Weber*. That is, as indicated in our analysis of the

California Court of Appeal decision, *supra,* consistent with the Fourteenth Amendment, a *public employer's* granting of preference must pass the standards this court has enunciated where racial categorizations are concerned. To utilize racial preferences, a public employer must advance a compelling state interest subject to the strictest scrutiny and show a nexus between the interests served and the means used to achieve that interest, and the means used must also be the least intrusive on innocent parties. Mere rectification of an imbalance has been held not a sufficient interest under the Fourteenth Amendment for a public employer to justify using racial preferences. Our courts have clearly held that the public employer must show that it engaged in prior intentional discrimination and justify the use of preferences to remedy the past intentional discrimination.

This case presents an excellent record for the determination of the constitutionality of the granting of racial and sex-based preferences in public employment. In this case, it was admitted that there was no prior intentional discrimination and even if there had been, there was no relationship shown between any prior discrimination and the preferences used, since prior discrimination was not the purported interest to be served. Even if the remedying of prior discrimination was the stated objective, there is no logical relationship between any prior discrimination and the program adopted by the Department. The nexus between the stated interest and the means to achieve it (improving the efficiency of the Department by balancing the work force to reflect the racial balance of the inmate population and to reflect the balance by sex in the California state labor force) has no support in the record, is illogical,

and is not the least intrusive means of achieving the objective, even if it were logical. Thus the findings of the trial court and the record squarely present this court with the opportunity to decide whether racial and sex-based preferences can be granted where the preferences were not designed, nor intended, to remedy past discrimination.

It should be noted that the Department's system of racial preferences inures substantially to the benefit of minority groups other than blacks, since the racial proportion of various minority groups in the California state prison system is substantially higher than that in the work force in general (Exhibit G and R). Thus, in *Weber* the preferences granted were clearly related to a reasonable index of past discrimination. The emphasis in *Weber* was still on the relevant labor force, as "new trainees were to be black until the percentage of black skilled craft workers in the Gramercy plant approximated the percentage of blacks *in the local labor force.*" *Weber, supra* at 61 L.Ed.2d 480, 486.

2. Another reason for granting a writ in this case is that this case most clearly raises the issue of whether the state may support as a sufficient and compelling interest for the adoption of a system of racial preferences in job opportunities, the need to maintain a proportionate level of individuals of a particular race to the number of inmates of that race in the California Department of Corrections in order to provide a "safe and efficient correctional system" (App. A, p. 19). There is substantial authority which rejects the notion that "operational needs" of a public employer may serve as a compelling state interest.

The satisfaction of a community preference has been rejected where the community preference was for the benefit of blacks as well as Caucasians. See *Baker v. City of St. Petersburg,* etc., cited *supra,* p. 13.

3. This case most clearly raises the issue of whether different standards of scrutiny will be applied to women and to minority groups other than blacks with respect to employment preferences. The writ should be granted since no case has clearly dealt with the differences in constitutional legislative history pertaining to women and various minority groups as opposed to blacks. As stated above, the Department's preferences inure substantially to the benefit of non-black minorities.

4. It is important for this court to grant a writ in this case to fully settle the issues raised by the use of race and sex in employment opportunities by public employers. Although this court has granted a writ of certiorari in *Fullilove v. Kreps* 584 F.2d 600 (2d Cir. 1978), cert. granted, 99 S.Ct. 2403 (May 21, 1979), that case will not fully dispose of issues herein. In *Fullilove* the constitutionality of a federal statute is challenged which provided a 10% "set-aside" for minorities in construction businesses at least 50% owned by minority group members. Although the federal government is judged by a standard of strict scrutiny under the Fourteenth Amendment, that case is clearly distinguishable since the legislative history disclosed a connection between past discrimination and the "set-aside" amendment which sought to remedy it. *Fullilove* 584 F.2d 600, 605. Moreover, the Court of Appeals for the second circuit noted, "the rule for ascertaining what the

purpose of Congress was in enacting a statute that is subject to scrutiny under the equal protection clause is more deferential than the rule which would be applied to test a state statute." *Fullilove,* supra 584 F.2d 600, 604. The issue here is whether the Fourteenth Amendment, absent prior intentional discrimination, and absent any other firmly established relationship between its practices and a compelling state interest, will permit a public employer to utilize racial or sex-based categories in employment opportunity decisions to the detriment of all other innocent applicants and employees.

Additionally, this case deals with the unique and rather personal claims of individual employees, rather than, the perhaps less personal interests of corporations, companies, partnerships and contractors.

5. Even as this petition goes to the printer, we are informed that the California Supreme Court has decided *Price v. Civil Service Commission,* (S.Ct. No. SF 23836). Although we have not had time to obtain and analyze this opinion, from our understanding of the reports, the decision makes a review of the issues raised herein even more compelling. In *Price* the Sacramento County Civil Service Commission adopted a temporary system of quotas designed to remedy the disproportionate impact on minorities of Sacramento County's employment practices. There was no proof of any prior intentional discrimination. The Supreme Court remanded the case to determine whether the disproportionate impact resulted from discriminatory practices of the county.

CONCLUSION

For the foregoing reasons the Petition for a writ of certiorari should be granted, and the judgment of the California Court of Appeal reversed.

Respectfully submitted,

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(Appendices follow)

Appendices

Appendix A

In the Court of Appeal of the State of California
First Appellate District, Division Four

1 Civil 42545
(Super. Ct. No. 700048)

Wayne Minnick et al.,
Plaintiffs and Respondents,
vs.
California Department of Corrections et al.,
Defendants and Appellants.

[Filed July 27, 1979]

The California Department of Corrections and Jero J. Enomoto, its director, appeal from a declaratory judgment which states that they have violated specified constitutional and statutory provisions "by discriminating by reason of sex and by reason of ethnic background in hiring and promotion of employees" in the Department. The judgment also orders, and the court issued, a "Permanent Injunction" restraining the Department and Enomoto from engaging in certain personnel practices in the future.

The judgment was entered after a nonjury trial of the issues joined on an amended complaint filed by respondents Wayne Minnick, Henry J. Darden, and California Correctional Officers Association ("CCOA") in 1976. Because of material changes in the direction and reach of respondents' action after that, the judgment grants only part of the relief they initially sought. It also reflects an

application of the California Supreme Court's 1976 decision in the celebrated *Bakke* case. (*Bakke v. Regents of the University of California* (1976) 18 Cal.3d 34.) That decision (hereinafter cited as *"California Bakke"*) has been substantially superseded by the United States Supreme Court's resolution of the same case during the pendency of this appeal. (*University of California Regents v. Bakke* (1978) 438 U.S. 265 [*"U.S. Bakke"*].) These chronological factors, and other problems, require that the extensive record be summarzied in close detail.

The Pleadings

Respondents Minnick and Darden are male Caucasians employed by the Department as correctional officers in the State prison system. They are also members of the CCOA, a Statewide organization. These facts, and the identities of the various defendants, were alleged in the amended complaint filed in 1976. The defendants named in it included the Department and Enomoto, who was sued in his representative capacity as its director.[1]

In each of four counts pleaded in the amended complaint, respondents made conventional allegations to the general effect that Minnick and Darden were entitled to maintain the action as a class action "on behalf of themselves and on behalf of all other employees of the Department of Corrections, insofar as such employees are disadvantaged

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[1]The defendants named in the amended complaint also included Carlos Sanchez, who was similarly sued in his capacity as assistant director of the Department; the State Personnel Board; and the "State of California" as such. These parties later disappeared from the action under circumstances which need not be described, leaving the Department and Enomoto as the sole defendants and appellants.

and/or find themselves judged with regard to hiring and promotional policies on the basis of their sex and/or race."

As pertinent here, it was further alleged in each count that the named defendants (see fn. 1, *ante*) had "discriminated" againts Minnick, Darden, and other employees of the Department "on the grounds of race, national origin, and sex," in the "carrying-out" of a so-called "Affirmative Action Program"; that specified aspects of the program were not being "contested" by respondents, but that its operation had caused discriminatory treatment of Minnick and Darden in described episodes in which each had been denied promotion in his employment by reason of his race and sex and "the race and/or sex of the person actually promoted" in preference to him; that each had exhausted his administrative remedies; and that CCOA had been "damaged" by the described employment practices because they frustrated its objectives as "an organization actively opposed to racism and sexism, and working actively to increase the unity of all correctional officers . . . ." It was alleged in a perorative paragraph that Minnick and Darden had been and will continue to be "denied promotional employment opportunities . . . on the basis of their race and/or the basis of their sex" in violation of the Fourteenth Amendment of the United States Constitution, sections 7 and 8 of article I of the California Constitution, and various federal and California statutes.

According to the fair import of the allegations in the various counts, and of multiple prayers which followed them, Minnick and Darden sought mandatory injunctions requiring their promotions and the recovery of damages

in the form of back pay for the higher positions allegedly denied them. According to the same sources, all three respondents sought an award of attorneys' fees alleged as "damages" they had incurred; preliminary and permanent injunctions restraining the defendants from further carrying out of the discriminatory personnel policies alleged; and a declaratory judgment to the effect that the policies were "unconstitutional, illegal, and void."

In an answer filed in 1976 by the defendants then named in the action (see fn. 1, *ante*), they pleaded material admissions and denials and several affirmative defenses.

The Trial

Respondents obtained an "Order To Show Cause Re Preliminary Injunction" which was set for hearing in early 1976 but ordered off calendar to permit discovery proceedings. The parties later stipulated that a rescheduled hearing on it would serve as a trial of the action and that jury trial was waived. Pursuant to a bifurcation agreed upon still later, the issues of "liability" (as distinguished from "damages") were tried first. The cause was tried on these bases between August and October of 1976.

The Evidence

Testimony from more than 30 witnesses, and 58 documentary exhibits, were received at the trial. The voluminous briefs argue the consequent mass of evidence in terms of what it shows, but neither side had adequately summarized it. The record supports the following recitals, which will suffice for purposes of this appeal:

The Department adopted a documented "Affirmative Action Plan" (hereinafter "AAP") in 1974. Its preamble states in pertinent part that the Department's "policy" is "to provide equal employment opportunities for all persons on the basis of merit and fitness and to prohibit discrimination based on race, sex, color, religion, national origin, or ancestry in every aspect of personnel policy and practices in the employment . . . and treatment of employees." According to its terms, the principal objectives of the AAP include (1) increasing the number of female employees in the Department to a percentage level equivalent with that in the total "California labor force" in April, 1970, and (2) increasing the number of "minority" employees to a level equalling at least 70! of any given "minority" in the inmate population of the Department (i.e., State prisoners).

The projected increases were variously broken down and allocated among segments of the Department and specified ethnic "minority" groups (defined as "Black," "Asian," "Spanish surname," "Native American," and "other extraction"), but they respectively translated into "overall" goals of "38% women employed" and "36% minorities employed." The AAP indicated, and there was evidence, that the desired "minority" level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system.

The percentage of female and minority employees in the Department were markedly below those projected in the AAP when it was adopted. The attainment of both percent-

ages was targeted to be reached by July, 1979. Although their realization was consequently directed to the hiring of new female and minority employees, the AAP provided that the underlying policy of nondiscrimination was to be applied in all areas involving the promotion, transfer, training, and work assignments of Department personnel.

There was evidence that various male Caucasian employees had been denied promotion or transfer in instances where preferences had been given to female or minority members. Proof presented by respondents Minnick and Darden supported the inference that each had been denied promotion in deference to a female or minority candidate, and it was shown that each had pursued a "grievance" to the State Personnel Board without success. It was also established, however, that neither had been eligible for promotion under conventional civil service rules which applied irrespective of the AAP or its implementation.

Various supervisory employees of the Department testified that preference for promotion or transfer was *not* given to female or minority employees in specified segments of the Department after 1974. There was thus a conflict in the evidence as to how widely the preferential policies expressed in the AAP had been pursued within the Department. According to all the evidence of instances where they had been applied, "preference" was given to female sex or minority status only to the extent that each was considered a "plus" factor in the assessment of a particular employee for promotion or transfer. Some evidence supported the inference that this "plus" had occasionally contributed to the promotion or transfer of the preferred employee ahead of nonpreferred candidates who were

otherwise more qualified for the new position. There was no evidence that such "preference" had ever resulted in the promotion or transfer of an employee who was *not* qualified to hold the position.

Vacancies in specific positions were occasionally left open, and promotions or transfers to them were sometimes delayed, until qualified female or minority employees could be found to fill them. Some of these positions were labelled "female only," or with words similarly referring to sex (including "male only") or to race or ethnic background. There was no evidence that any specific number or percentage of positions were reserved for members of either sex or of any racial or ethnic group.

In response to an interrogatory, the Department in effect denied that it had "wilfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities . . . on the basis of a person's race, color, creed, sex or national origin." It added, " . . . however, that as a result of its past hiring and promotion practices and procedures, there has been an adverse discriminatory impact on certain minorities and the female sex in terms of initial hiring and also promotion." This statement was the only substantial reference in the evidence to the effect that the Department's personnel practices had discriminated against females and minorities in the "past." The exercise of "preference" in their favor in recent years, as described above, was limited to cases involving the promotion, transfer, or work assignment of employees only. There was no substantial evi-

dence of any instance in which it had been exercised in the "initial hiring" of a new employee.

Post-Trial Proceedings

The cause was submitted on November 23, 1976. On January 5, 1977, the trial court filed a memorandum decision indicating its intention to grant injunctive relief to respondents, stating its reasons, and directing respondents to prepare an appropriate order and findings of fact and conclusions of law. Protracted proceedings followed, during 1977, before findings were settled and signed. The pertinent events were these:

On February 28, the court made an order granting and issuing the equivalent of an injunction pendente lite which restrained the Department and Enomoto from performing any act of "hiring or promoting any employee in the Department . . . in which preference is given to race, color, sex, or national origin until the further order of this court."[2]

In April, the Department and Enomoto moved for an "order augmenting the record" to include a massive array of sworn declarations and other documents for the purpose of showing that the AAP had been "designed to rectify" past personnel practices which had operated to discriminate on racial and other grounds.[3] The motion was orally denied at a hearing conducted on May 5.

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[2]The Department and Enomoto joined in an appeal taken from this order on March 4. That appeal was never perfected, and the briefs on this one do not mention it. For these reasons, and for recordkeeping purposes, we hereinafter dismiss it.

[3]Respondents moved "in the alternative" for an order "reopening the case for further evidence of the past discriminatory practices

In June, respondents moved for an order certifying their action as a class action. At a hearing on this motion in July, the court indicated its view that respondents Minnick and Darden were not entitled to damages, nor to maintain a class action for damages because they had not shown that they had been denied promotion by reason of the discriminatory personnel practices alleged. The court nevertheless stated that it had perceived such practices to exist, and that it desired to grant declaratory relief against them. A discussion followed as to whether Minnick, Darden and CCOA still had "standing" to obtain that relief in the action. The court accepted a stipulation that they did, denied the motion for certification, and ruled "money damages" out of the case.[4] On August 2, the court made formal orders denying the motion for certification and the Department's and Enomoto's motion for an order augmenting the record.

The Findings and Judgment

The thus-narrowed issues in the action were resolved in the findings of fact and conclusions of law, which were settled after lengthy hearings. The trial court signed and filed them on October 11, 1977. The declaratory judgment

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which the . . . Affirmative Action Plan was designed to rectify." On the alternative motion, the accompanying declarations and other documents were presented as an offer of proof.

[4]The court stated in these respects as follows: "Then it's stipulated or conceded that the individual plaintiffs in this action [Minnick and Darden] and the Association [CCOA] . . . have standing in this action, and that the court has *jurisdiction* in the matter to the extent that if the testimony and evidence will support it, to grant injunctive relief that would preclude the Department from in any manner, shape, or form, discriminating against or in favor of anyone in that Department by reason of race, color, place of origin, sex, and so on. . . . I will make a ruling that I'll not grant you your motion to consider this a class action, and I will deny your seeking monetary damages." (Emphasis added.)

and the "Permanent Injunction" were entered the next day.

The pertinent findings (nos. 8, 10, 13, 16 and 19) are quoted in the margin.[5] Two of the conclusions of law were

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[5]"8. Defendants Department . . . and Jeri J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department. In so doing, the defendants were motivated at least in part by . . . [the] . . . Affirmative Action Plan. . . . In so doing, preferences result in favor of certain ethnic groups, or in favor of one sex to the detriment of the other, and not *solely* on the qualifications of the individuals involved, or their merits." (Emphasis added.)

"10. All employees of the Department, including the plaintiff[s] . . . Minnick and . . . Darden, have been discriminated against by reason of their race."

"13. There has been long standing discrimination against minorities and women by our society. However, the acts complained of in . . . [this] . . . action are not justified by, nor do they remedy, past wrongs by society against any such minorities or women. Furthermore, the acts complained of, and more particularly described in these Findings of Fact and Conclusions of Law, operate to the detriment of innocent employees of the Department who played no role in any previous discrimination by portions of our society."

"16. Defendants have no scientific or objective basis whatsoever by which they classify people into one racial category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants. Defendants have no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another, can complain, or by which a person complaining of the categorization of another person may complain."

"19. The unique and sensitive nature of the functions of the Department . . . and the peculiar difficulties inherent in the administration of California's prison system require the Department to exercise broad discretion in making job assignments and in determining the employment responsibilities of its employees. Because of the conditions and circumstances within California prisons and throughout the Department . . . , it is necessary for the Department to consider, among other factors, the composition of the existing work force and of the inmate population, and the race and sex of employees, in order to serve the *compelling state*

substantially copied into paragraphs of the judgment which read as follows:

"1. Defendants . . . Department . . . and . . . Enomoto, by discriminating by reason of sex and by reason of ethnic background in hiring and promotion of employees . . . , have violated and are continuing to violate [1] the Fourteenth Amendment to the United States Constitution, [2] Article I, Sections 7 and 8 of the California Constitution, [3] Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq., [4] 42 U.S.C. §§ 1981 and 1983, [5] California Labor Code § 1410 et seq., and [6] California Government Code § 50084.

". . .

"3. Defendants . . . , by engaging in employment practices above-described and by the arbitrary and capricious nature of the racial categorization process (as particularly described in the Findings of Fact and Conclusions of Law) utilized by said defendants, have deprived and are continuing to deprive employees in the Department . . . of substantive and procedural due process of law within the meaning of both the Fourteenth Amendment to the United States Constitution and within the meaning of Article I, Section 7 of the California Constitution."[6]

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interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." (Emphasis added.)

[6]The constitutional and statutory provisions cited in paragraph 1 (which is here quoted with some corrective editing and our numbers added) were those cited in respondents' amended complaint as later amended again. Paragraphs 1 and 3 of the judgment incorporated the substance of the trial court's conclusions of law nos. 2 and 3, respectively. Its conclusion of law no. 1 stated that "[p]laintiffs [respondents] are entitled to injunctive relief."

In a trailing provision of the judgment, the court ordered that "[a] Permanent Injunction attached hereto, marked Exhibit 'A' and incorporated herein by reference, be issued in this case." The "Permanent Injunction" was thereupon signed and issued by the court, and entered on October 12, 1977, as a separate document.[7]

The Appeal

The Department and Enomoto filed a notice of appeal on October 14, 1977, stating that they appeal from the judgment and the "Permanent Injunction." They subsequently petitioned this court for a writ of supersedeas. We granted the petition and entered an order staying enforcement of the judgment and the "Permanent Injunction" pending determination of the appeal.

REVIEW

Paragraph 1 Of The Judgment

This paragarph is to be reviewed, separately, in light of the successive constitutional and statutory provisions

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[7]The document is addressed to the Department, Enomoto as its director, "their officers, agents, servants and employees, and all persons acting in concert with them." It opens with recitals which refer to the trial of the action and to "good cause appearing" for the following language: "IT IS HEREBY ORDERED that . . . [the addresses] . . . shall be, and they hereby are, enjoined and restrained from engaging in . . . any and all of the following acts: [¶] (1) From hiring or promoting any employee in the Department . . . in which [*sic*] preference, advantage, or benefit is given to race, color, sex, or national origin. [¶] (a) Provided, however, that nothing in this order shall prevent any person, in determining the assignments and job responsibilities of employees of the Department . . . , from considering, among other relevant factors, the race and sex of the employees in question. [¶] (b) Provided, however, 'male only,' 'female only,' and bi-lingual certifications may be requested and/or granted when the job-related aspect of the certification can be objectively and demonstrably shown and established. . . ."

it declares the Department and Enomoto to have "violated." (See the judgment as quoted in the text at fn. 6, *ante.*)

The Equal Protection Clause
Of The Fourteenth Amendment

Although the first citation in paragraph 1 refers only to "the Fourteenth Amendment to the United States Constitution," it is undisputed that the reference is to the Equal Protection Clause.[8] The *Bakke* litigation and its overlapping chronology are pertinent for this reason. The California Supreme Court decided *Bakke* on September 16, 1976 (*California Bakke, supra,* 18 Cal.3d at p. 34), during the trial of this case and a full year before it was decided in 1977. The superseding decision of the United States Supreme Court emerged on June 28, 1978 (*U.S. Bakke, supra,* 438 U.S. at p. 265), several months after this appeal was taken.

Both decisions require discussion, but neither of them need be analyzed at length. Both courts ordered the plaintiff admitted to a medical school operated by the University of California after he had successfully challenged its "special admission program." (*California Bakke, supra,* 18 Cal. 3d at pp. 63-64; *U.S. Bakke, supra,* 438 U.S. at pp. 281, 320.) A formula employed in the program effectively limited eligibility for 16 student seats at the school (out of 100) to applicants who were members of specified racial

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[8]The clause appears in its context as follows: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*" (U. S. Const., 14th Amend., § 1 [emphasis added].)

or ethnic minorities. (*U.S. Bakke, supra,* 438 U.S. at pp. 273-275.)

The California Supreme Court held that a "strict scrutiny" test was to be applied because of the racial classification thus effected (*California Bakke, supra,* 18 Cal. 3d at pp. 49-50), found from its application that the program violated the Equal Protection Clause because the rigid and exclusive racial quotas employed in it served no compelling governmental interest not obtainable by less intrusive means (*id.,* at pp. 52-62), and produced a result which we may treat in two parts. Part 1 declared the program unconstitutional under the Equal Protection Clause. (*Id.,* at pp. 62-63.) Part 2 effectively enjoined the University from giving *any* consideration to the race of an applicant seeking admission to the medical school. (See *id.,* at pp. 55, 61-63; *U.S. Bakke, supra,* 438 U.S. at pp. 279, 320.)

In reviewing parts 1 and 2, all nine members of the United States Supreme Court substantially agreed that the racial classification in the program was "suspect" for equal protection purposes and that the "strict scrutiny" test was accordingly to be applied in determining whether the program served a compelling governmental interest. (*U.S. Bakke, supra,* 438 U.S. at pp. 287-305, 355-362.) Five members thereupon joined in affirming part 1. (*Id.,* at pp. 271, 319-320.) One of these five (Justice Powell) joined four other members in a net result which reversed part 2. (*Id.,* at pp. 272, 320, 325-326, 379.)

The present trial court had meanwhile followed the all-inclusive proscription of part 2 when it found and declared, in 1977, that the Department and Enomoto had

"violated" the Equal Protection Clause by extending "preferences" to employees based on race or sex. (See finding no. 8 in fn. 5, *ante.*) Its application of part 2 at that time was entirely proper, but the question now is whether the declaration may stand in light of *U.S. Bakke.* We hold that it cannot.

Justice Powell's opinion in *U.S. Bakke* establishes the reasoning and guidelines under which consideration may be given to the race or ethnic background of an applicant for admission to a State-operated *school* reached by the Fourteenth Amendment. (See *U.S. Bakke, supra,* 438 U.S. at p. 287.) Such consideration is permitted by the Equal Protection Clause because it is necessary to promote the "compelling" interest of the State in attaining "ethnic diversity" among the school's students. (*Id.,* at pp. 311-315.) The Clause nevertheless requires a school pursuing that objective to do it in such way that (1) ". . . race or ethnic background may be demed a 'plus' in a particular applicant's file, yet . . . does not insulate the individual from comparison with all other candidates for the available seats"; and (2) a candidate not credited with that "plus" will be "fairly and competitively" evaluated for all the seats without being "totally excluded from a specific percentage" of them which has been restricted to a particular racial or ethnic group. (*Id.,* at pp. 316-319.)

This language closely fits the Department's personnel practices challenged here. In its finding no. 19, the trial court effectively determined that the practices apply the prison-related realities of race and sex to the point of promoting a "compelling state interest" in a safe and efficient

correctional system. (See fn. 5, *ante.*) The finding is supported by the evidence. The "interest" mentioned in it lacks the constitutional basis of the University of California's interest in attaining "ethnic diversity" among its students (see *U.S. Bakke, supra,* 438 U.S. 265 at p. 313), but safety and efficiency in the prisons of the same State are no less "compelling." The Department is pursuing those objectives by assigning a female or minority employee a "plus" in competition for promotion or transfer. The qualifications of other employees in the competition are still "weighed fairly and competitively." (See *id.,* at pp. 317-318.)

The Department's AAP refers to the realization of "38% women employed" and "36% minorties employed" within five years. This language sounds in "quota" terms, but neither percentage figure bespeaks a "quota" of the type proscribed in Justice Powell's opinion in *U.S. Bakke.* Each is an optimum "quota" to the extent that it defines a goal to be attained in the future. Neither is a functional "quota" which now operates to place either—or any—percentage of positions in the Department beyond the reach of male or nonminority employees. (Compare *U.S. Bakke, supra,* 438 U.S. 265 at pp. 275, 319.) The distinction was recognized in finding no. 19, where the trial court found partial *motivation* for the Department's practices in the AAP but *discrimination* in the practices alone. (See fn. 5, *ante.*) The "Permanent Injunction" restrains certain aspects of the practices but not the implementation of the AAP as such. (See fn. 7.)

The terminal question is whether this record supports the declaration, in paragraph 1 of the judgment, that the Department and Enomoto violated the Equal Protection Clause by "discriminating" on the bases of race and sex in the "hiring and promotion of employees." The declaration rests on the trial court's finding (no. 8) that they had "discriminated" in those respects by applying personnel practices from which "preferences result in favor of certain ethnic groups or . . . of one sex." (See fn. 5, *ante*.) According to our review of the evidence, it does not support a finding that "preferences result" from the practices in favor of males or in the "hiring" of employees. Finding no. 8 therefore fails to support the declaration in either respect.

The practices otherwise identified in the finding have just been examined in light of *U.S. Bakke* and under the "strict scrutiny" it commands. We conclude that they are permitted by the Equal Protection Clause within the limited extent that noncontrolling "preferences result in favor of certain ethnic groups" for purposes of promotion or transfer of personnel within the Department, because they are necessary to promote the compelling interest of this State in the proper management of its correctional system. For the same reasons, they are permitted insofar as the same limited "preferences result" in favor of women. Finding no. 8 accordingly fails to support the declaration that the Department and Enomoto violated the Equal Protection Clause in any respect.

We move to other constitutional and statutory violations charged in paragraph 1 of the judgment. We preliminarily

observe from the record that the trial court placed almost exclusive emphasis on the violation of the Equal Protection Clause it declared first, and that the others trailed it into paragraph 1 in the form of little more than an omnibus recital. We may examine them more briefly for that reason.

The California Constitution

The court further declares in paragraph 1 that the Department and Enomoto, "by discriminating . . . ," have violated article I, sections 7 and 8, of the California Constitution.[9] Again, the record demonstrates that the reference to section 7 is to its equal protection language alone. (See fn. 9, *ante*.) The reference excludes the declaration from the reach of *U.S. Bakke* because the constitutional issues raised in that case were decided under the corresponding provisions of the Fourteenth Amendment. (*U.S. Bakke, supra,* 438 U.S. 265 at pp. 271, 320.)

Decisions of the United States Supreme Court defining "fundamental civil rights" under the federal Constitution "are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." (*People v. Longwill* (1975)

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[9]These sections respectively provide:

"7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

"(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

"8. A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

14 Cal.3d 943, 951, fn. 4; *Serrano v. Priest* (1976) 18 Cal.3d 728, 764.) Respondents have asserted "fundamental civil rights" in this action, but we are not persuaded that the rationale of *U.S. Bakke* provides them with "less individual protection than is guaranteed by California law." Under that rationale, the evidence does not support the declaration that section 7 of article I has been violated.

Section 8 of article I does not parallel a literally equivalent provision in the federal Constitution. Respondents Minnick and Darden, and other employees of the Department who claim to be disaffected by its preferential personnel practices, are "pursuing . . . employment" within the meaning of section 8. (See fn. 9, *ante.*) The limited "preferences" given to certain employees, for purposes of promotion and transfer, are based on "race" and "sex" within the same meaning. The "preferences" do not exclude others from eligibility for promotion or transfer, nor from having their own qualifications "weighed fairly and competitively" in the process. (See *U.S. Bakke, supra,* 438 U.S. 265 at pp. 317-318.) None of them is "disqualified" in any respect within the meaning of section 8. The evidence does not support the declaration that the section has been violated.

Federal Statutes

Paragraph 1 declares a violation of "Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)" of "42 U.S.C. §§ 1981 and 1983." Title VII does not reach the Department, a public employer, because it was enacted by the Congress "pursuant to the Commerce power to regulate

purely private decisionmaking . . . ." (*United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) ..... U.S. ....., ... [47 U.S.L.Week 4851, 4854-4855], fn. 6.)

"42 U.S.C. §§ 1981 and 1983" are vintage statutes which operate to guarantee a civil remedy for violations of the Fourteenth Amendment. (See *Monroe v. Pape* (1961) 365 U.S. 167, 170-172; *Rizzo v. Goode* (1976) 423 U.S. 362, 370-371.) They have no application here. The declaration that the Department and Enomoto "violated" any of these statutes is erroneous.

State Statutes

Paragraph 1 declares violations of "California Labor Code § 1410 et seq." (the California Fair Employment Practices Act) and "Government Code § 50084." Respondents state that they "agree" that these statutes "provide no greater legal bases for stating a cause of action than do the Equal Protection Clauses of the United States and California Constitutions and Title VII of the Civil Rights Act of 1964." Our disposition of the points raised on these various sources therefore disposes of this one. Government Code section 50084 is inapplicable for the additional reason that it requires the employment practices of a "local agency" to conform to the Civil Rights Act of 1964. Neither the Department nor Enomoto is a "local agency" for purposes of this statute. (See Gov. Code, § 50001.)

Paragraph 3 Of The Judgment

This paragraph declares that the Department and Enomoto have deprived employees in the Department "of substantive and procedural due process of law within the meaning of both the Fourteenth Amendment to the United

States Constitution and Article I, Section 7 of the California Constitution." The reference unmistakably cites the due process clauses of both sources. (See fns. 8 and 9, *ante.*) The declaration rests on the trial court's finding no. 16 (quoted in fn. 5), relative to procedural deficiencies involving the Department's classification of employees by race and their opportunity to challenge a racial classification by way of administrative review. (See *ibid.*)

The deficiencies found were not challenged by respondents in this action. Finding no. 16 was made, at the trial court's insistence, after it had been shown that racial classifications were made on the basis of employees' surnames. The reference in the declaration to the "arbitrary and capricious nature" of this procedure derives from observations in the record that the identification of race by surname is somewhat casual and very possibly inaccurate (e.g., in identifying the race of a woman married to a husband with an Asian surname). The observations are valid, but the finding and declaration are not. There is no evidence showing that the asserted deficiencies have ever produced an erroneous racial classification *in fact,* nor that any person has been aggrieved by them *in fact.* If the evidence dimly supports finding no. 16, the finding itself does not support the declaration that anyone has been denied due process of law. The declaration is accordingly erroneous.

* * * * *

The declarations in paragraphs 1 and 3 of the judgment are thus unsupported by the record. Its other provisions are strictly ancillary to those paragraphs. We reserve it accordingly.

* * * * *

The "Permanent Injunction"

Although the issuance of this injunction was expressly ordered in the trailing provision of the judgment quoted above, it emerged as a separate document in a format reciting "good cause" for its injunctive language. (See fn. 7, *ante.*) These factors make it independently appealable as an "order granting . . . an injunction" (Code Civ. Proc., § 904.1, subd. (f)) [sic], but it will not stand by itself. Although the exceptions stated in it ("Provided, however") appear to make allowance for recognition of employees' race and sex in the Department's work assignments, its express injunction against giving "advantage" or "benefit" to race or sex would prohibit the competitive "plus" now given to some female or minority employees under consideration for promotion or transfer. Because *U.S. Bakke* permits the "plus," the injunctive language is overbroad in itself.

It is also based on the trial court's conclusion of law that respondents were "entitled to injunctive relief" against the personnel practices deemed to have "violated" the law as declared in the other conclusions of law and in the judgment. (See fn. 6, *ante.*) Because we have now held that they have not "violated" the law, the injunction must fall with the judgment. We reverse it.

The Motion To Augment Or Reopen

The Department and Enomoto made this motion, five months after the case had been submitted for decision, for the purpose of proving past discrimination by the Department on the bases of race and sex. (See the text at fn. 2, *ante.*) In ordering it denied, the trial court remarked that it was "irrelevant." That characterization was not given it

in the formal order denying it, but the reasons the court deemed it "irrelevant" were later stated in finding no. 13. (See fn. 5.)

The court did not abuse its discretion in denying the motion, which was made by afterthought and much too late. We need not decide the relevance of the evidence offered, nor the validity of finding no. 16. If the case is to be retried, Justice Powell's decision in *U.S. Bakke* will be pertinent to the determination of either question. (See *U.S. Bakke, supra,* 438 U.S. 265 at pp. 307-310.)

Respondents' "Standing"

There is no claim of error in this regard, but we perceive problems with respondents' "standing" which will recur if the case is to be retried. The problems appeared when they moved for an order certifying their action as a class action after it had been recognized that respondents Minnick and Darden were not entitled to damages or injunctive relief as individuals. The motion was denied when the parties stipulated that all three respondents had "standing" to obtain declaratory relief, and that the trial court had "jurisdiction" to grant it. (See fn. 4, *ante.*)

Although respondents were not permitted to proceed in a class action, the results had the dimensions of class relief. There is a real question whether Minnick and Darden may act as representatives of other employees if they are not entitled to relief as individuals. Another question is whether all employees in the Department may be represented by the CCOA, whose membership is apparently limited to correctional officers only. If their "standing" to proceed with the litigation could be conferred by stipula-

tion, the trial court's *jurisdiction* could not. (1 Witkin, California Procedure (2d ed. 1970) Jurisdiction, § 10, pp. 534-536.) These problems require examination if the case is to be retried.

The appeal purportedly taken on March 4, 1977, is dismissed. The "Judgment And Declaratory Judgment" and the "Permanent Injunction" entered on October 12, 1977, are reversed. The stay order made by this court on November 4, 1977, is vacated.

CERTIFIED FOR PUBLICATION.

Rattigan, J.

We concur:

Caldecott, P. J.

Christian, J.

Appendix B

Court of Appeal of the State of California

First Appellate District

Division Four

No. 42545

Wayne Minnick et al.,
Plaintiffs and Respondents,

vs.

California Department of Corrections et al.,
Defendants and Appellants.

[Filed August 23, 1979]

BY THE COURT:

The typewritten opinion filed herein on July 27, 1979, is modified as follows:

On page 6, strike lines 17, 18, and 19, and insert: "38% women employed" and "36% minorities employed." There was evidence that the attainment of these goals would serve inmate-related objectives of

On page 24, strike the eight-line paragraph commencing with the words "Paragraph 1 declares" and insert the following two paragraphs in its place:

It is further declared in paragraph 1 of the judgment that the Department and Enomoto, "by discriminating

. . . ," have violated federal statutes cited as "Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)" and "42 U.S.C. §§ 1981 and 1983." As amended, Title VII of the Civil Rights Act of 1964 effectively prohibits discrimination by an "employer," in any area of nonexcepted employment (see 42 U.S.C. § 2000e-1), on the basis of an "individual's race, color, religion, sex, or national origin." (*Id.*, § 2000e-2, subd. (a).) The prohibition reaches the Department, a public employer, as well as private employers. (*Id.*, § 2000e, subds. (a), (b); *Dothard v. Rawlinson* (1977) 433 U.S. 321, 331-332, fn. 14.)

U.S. Bakke did not involve Title VII as such, but a clear majority of the United States Supreme Court has since held, on the basis of the congressional intent underlying the title, that it does not prohibit *private* employers from voluntarily adopting "race-conscious affirmative action plans." (*United Steelworkers of America, AFL-CIO-CLC v. Weber et al.* (1979) ..... U.S. ....., ...-..... [99 S.Ct. 2721, 2727-2730].) The Department has done precisely that, and the trial court found from substantial evidence that the plan it adopted had partially "motivated" the personnel practices challenged in this action. (See finding no. 8, quoted in fn. 5, *ante*.) The fact that the Department is a public employer suggests no basis for excluding it from the reach of the congressional intent and objectives analyzed in *United Steelworkers*. We accordingly perceive no violation of Title VII in the practices the Department's AAP has "motivated." The contrary declaration in paragraph 1 of the judgment is erroneous.

On Page 24, strike the last two lines and insert: Department and Enomoto "violated" either of them is erroneous.

The petition for rehearing is denied.

Dated August 23, 1979

Caldwell, P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Nov. 8 1979

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 42545

Minnick

vs.

California Department of Corrections

Respectfully,

G. E. BISHEL
Clerk

Appendix D

Superior Court of the State of California
for the City and County of San Francisco
Department X2

[Filed Jan. 5, 1977]

January 5 1977

No. 700 048

Wayne Minnick and
Henry J. Darden, et al.

Plaintiff.

vs.

California Department of Corrections: Jeri J. Enomoto, Director of the California Department of Corrections; State Personnel Board of the State of California

Defendant.

Notice of Intended Decision

The testimony and documentary evidence herein show, and defendants admit, that defendants have carried on a campaign to, and they do now, select applicants for employment and for promotion based on their sex and on their racial background or ancestry.

Defendants seek to justify their actions on the basis that while the sex of an applicant is *one* of the factors considered, the applicant must be otherwise qualified for the

duties to be performed. Sex or racial background is not the *sole* factor considered. Plaintiffs on the other hand assert that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void.

The Court agrees with plaintiffs.

Let a Writ issue directing that defendants, their agents and employees are enjoined and precluded from considering as a factor for employment or for the promotion of a candidate his sex, race or national origin.

Counsel for plaintiffs will prepare an appropriate order and will prepare Findings of Fact and Conclusions of Law consistent with the foregoing.

Dated: January 5, 1977.

/s/ Byron Arnold

Judge

MINUTE ORDER

Appendix E

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Attorneys for Plaintiffs

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 700 048

Wayne Minnick, et al.,
Plaintiffs,
vs.
California Department of Corrections, et al.,
Defendants.

[Filed Oct. 11, 1977]

Judgment and Declaratory Judgment

The above-entitled matter came on regularly for trial, which trial commenced on August 23, 1976. The trial was concluded in October, 1976. The parties submitted Post-Trial Briefs, and oral argument was held subsequent to the submission and consideration of same on November 23, 1976.

Additional hearings were held related to motions filed by the parties and the scope of relief to be granted by this Court.

The Court having heard the testimony, received the oral and documentary evidence, and having considered oral and written arguments offered by the respective parties, and having made its Findings of Fact and Conclusions of Law, and good cause appearing:

IT IS THE DECLARED JUDGMENT OF THIS COURT that:

(1) Defendants California Department of Corrections and Jeri J. Enomoto, by discriminating by reason of sex and by reason of ethnic background in hiring and promotion of employees in the California Department of Corrections, have violated and are continuing to violate the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, Article 1, Section 7 and 8 of the California Constitution, 42 U.S.C. §§ 1981 and 1983, California Labor Code § 1410 *et seq.*, and California Government Code § 5084.

(2) This Court has jurisdiction to grant relief under each of the above-quoted constitutional provisions and/or pieces of legislation.

(3) Defendants California Department of Corrections and Jeri J. Enomoto, by engaging in employment practices above-described and by the arbitrary and capricious nature of the racial categorization process (as particularly described in the Findings of Fact and Conclusions of Law) utilized by said defendants, have deprived and are con-

tinuing to deprive employees in the Department of Corrections of substantive and procedural due process of law within the meaning of both the Fourteenth Amendment to the United States Constitution and within the meaning of Article 1, Section 7 of the California Constitution.

IN ADDITION, IT IS HEREBY ORDERED that:

(1) A Permanent Injunction, attached hereto, marked Exhibit "A" and incorporated herein by reference, be issued in this case.

(2) Plaintiff's shall recover their costs in this action.

(3) Plaintiffs shall receive attorneys' fees in a sum to be specified in the Memorandum of Costs and Disbursements to be filed herein, subject only to any exceptions that may be filed and sustained as to the amount thereof.

Dated: October 11, 1977

/s/ Byron Arnold
Judge of the Superior Court

Approved as to form:

Howard, Prim, Rice, Nemerovski,
Canady & Pollak
A PROFESSIONAL CORPORATION

By /s/ STUART R. POLLAK Dated: October 11, 1977
Stuart R. Pollak
Attorneys for California
Department of Corrections and
Jeri J. Enomoto

Approved as to form:

Office of the
Attorney General

By /s/ GORDON ZANE Dated: October 11, 1977

Gordon Zane
Attorneys for the State
Personnel Board and State of
California

Approved as to form:

Carroll, Burdick & McDonough

By /s/ RONALD YANK Dated: October 11, 1977

Ronald Yank
Attorneys for Plaintiffs

Appendix F

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In the Superior Court of the State of California
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No. 700 048

Wayne Minnick, et al.,
Plaintiffs,

vs.

California Department of Corrections, et al.,
Defendants.

[Filed October 11, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came regularly on for trial on August 25, 1977. The trial proceeded before the Court sitting without a jury, a jury having been waived by the parties. Ronald Yank of Carroll, Burdick and McDonough appeared as attorneys for plaintiffs, and Gordon Zane, Deputy Attorney General, appeared as attorneys for de-

fendants. In February, 1977, Stuart Pollak of Howard, Prim, Rice, Nemerovski, Canady and Pollak, were substituted as counsel for defendants California Department of Corrections and Jeri J. Enomoto, Director of the California Department of Corrections.

The Court, having heard the oral testimony, having received the oral and documentary evidence, and having considered oral and written arguments offered by the respective parties, and having issued its NOTICE OF INTENDED DECISION, filed herein on January 5, 1977, and being fully advised in the matter, makes the following FINDINGS OF FACT.

Findings of Fact

(1) At all times herein pertinent plaintiffs Wayne Minnick and Henry J. Darden, and each of them, were employees of the Department of Corrections of the State of California. They are caucasian males.

(2) At all times herein relevant, plaintiff California Correctional Officers' Association (hereinafter referred to as "CCOA"), was and is an "employee organization" within the meaning of California Government Code §3526, and was and is a recognized agent of correctional officers and some other employees of defendants for purposes of representing those employees in all matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours, and other terms and conditions of employment, all within the meaning of California Government Code § 3525, *et seq.*

(3) Plaintiff CCOA has fairly and adequately represented the interests of its members who have been, are being, or will be disadvantaged by the employment practices hereinafter described.

(4) At all times herein relevant, defendant California Department of Corrections was and is an agency of the State of California entrusted with the official responsibility of custody of persons convicted of crimes under California law and sentenced to terms in California correctional facilities. The Department of Corrections (hereinafter "Department") carries out its responsibilities at least in part pursuant to California Penal Code § 5000, *et seq.*

(5) At all times herein relevant, defendant Jeri J. Enomoto was and is Director of the California Department of Corrections, and was and is entrusted with the official responsibility of the statewide administration of California correctional facilities, including the hiring, promotional, and other job opportunity procedures for the Department.

(6) At all times herein relevant, defendant State Personnel Board (hereinafter "SPB") was and is an agency of the State of California, entrusted with the official responsibility of overseeing and administering the manner in which various agencies of the State of California hire and promote employees of those agencies. The SPB is entrusted with administering and overseeing the Civil Service System by which appointments and promotions are made in agencies of the State of California.

(7) Defendants Department of Corrections, Jeri J. Enomoto, and the SPB have all been served in this action, and have appeared in this action through counsel.

(8) Defendants Department of Corrections and Jeri J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department. In so doing, the defendants were motivated at least in part by an Affirmative Action Plan, adopted effective July 1, 1974. A copy of that Plan is defendants' Exhibit "G" in evidence. The Affirmative Action Plan was revised effective April 1, 1975. A copy of the revised Affirmative Action Plan is Exhibit "R" in evidence. In so doing, preferences result in favor of certain ethnic groups, or in favor of one sex to the detriment of the other, and not solely on the qualifications of the individuals involved, or their merits.

(9) There are certain aspects of the Department's affirmative action program which are not contested by plaintiffs herein. Those include such matters as aggressive recruiting measures, education for all personnel, including supervisors in charge of hiring, firing, and promotions, and special training classes for certain applicant groups and/or Department employees potentially interested in promotional opportunities.

(10) All employees of the Department, including the plaintiff Wayne Minnick and the plaintiff Henry J. Darden, have been discriminated against by reason of their race.

(11) Plaintiffs Minnick and Darden completed whatever exhaustion of administrative remedies might be required by processing their grievances to and through the SPB.

(12) Unless restrained by order of this Court, defendants the Department of Corrections and Jeri J. Enomoto will continue the discrimination described herein.

(13) There has been long standing discrimination against minorities and women by our society. However, the acts complained of in the above-entitled action are not justified by, nor do they remedy, past wrongs by society against any such minorities or women. Furthermore, the acts complained of, and more particularly described in these Findings of Fact and Conclusions of Law, operate to the detriment of innocent employees of the Department who played no role in any previous discrimination by portions of our society.

(14) Plaintiffs Minnick and Darden, and other employees, will be affected by future implementation of the employment practices described herein, with regard to job opportunities with the Department.

(15) Plaintiffs, and other employees in the work force of the Department, have no plain, speedy or adequate remedy at law other than the relief prayed for in documents filed with this Court, with regard to future job opportunities. Plaintiffs, and other employees employed by the Department, have suffered, and will continue to suffer, irreparable injury and damage in their employment opportunities, in that they, and each of them, have been and will continue to be denied job opportunities and employment with the Department should the Department action as described herein not be enjoined.

(16) Defendants have no scientific or objective basis whatsoever by which they classify people into one racial

category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants. Defendants have no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another, can complain, or by which a person complaining of the categorization of another person may complain.

(17) Plaintiffs have complied with all administrative remedies they may have had to exhaust under Title VII of the Civil Rights Act of 1964 by filing timely charges with the EEOC and by receiving a right-to-sue letter prior to the end of the trial.

(18) It was not established by competent evidence that the State Personnel Board, State of California, has engaged in, or endorsed or approved on the part of the Department of Corrections, State of California, a system of granting illegal preferences in civil service matters to minorities and/or women which would constitute illegal discrimination.

(19) The unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system require the Department to exercise broad discretion in making job assignments and in determining the employment responsibilities of its employees. Because of the conditions and circumstances within California prisons and throughout the Department of Corrections, in making job assignments and in determining employment responsibilities it is necessary for the Department to consider, among other factors, the composition of the existing work

force and of the inmate population, and the race and sex of employees, in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

(1) Plaintiffs are entitled to injunctive relief.

(2) Defendants, Department of Corrections and Jeri J. Enomoto, by engaging in the employment practices above-described, have violated and are continuing to violate the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq., Article 1, Section 7 and 8 of the California Constitution, 42 U.S.C. §§ 1981 and 1983, California Labor Code § 1410, et seq., and Government Code § 50084. This Court has jurisdiction to grant relief under each of the above-quoted constitutional provisions and/or pieces of legislation.

(3) Defendants, Department of Corrections and Jeri J. Enomoto, by engaging in the employment practices above-described, and by the arbitrary and capricious nature of the racial categorization process they have utilized, have deprived and are continuing to deprive plaintiffs and all other employees of the Department of substantive and procedural due process of the law within the meaning of both the Fourteenth Amendment to the United States Con-

stitution and within the meaning of Article 1, Section 7 of the California Constitution.

(4) It is not contrary to law for the Department, in determining job assignments and job responsibilities of its employees, to consider, among other relevant factors, the composition by race and sex of the existing work force and of the inmate population, and the race and sex of the employees in question.

JUDGMENT IS HEREBY ORDERED TO BE ENTERED ACCORDINGLY.

DATED: October 11, 1977

/s/ BYRON ARNOLD
Judge of the Superior Court

Approved as to form:

Howard, Prim, Rice, Nemerovski,
Canady & Pollak

Dated: October 11, 1977

By /s/ STUART R. POLLAK
Stuart R. Pollak
Attorneys for California
Department of Corrections and
Jeri J. Enomoto

Approved as to form:

OFFICE OF THE
ATTORNEY GENERAL

Dated: October 11, 1977

By /s/ GORDON ZANE

Gordon Zane
Attorneys for the State
Personnel Board and State of
California

Approved as to form:

Carroll, Burdick & McDonough

Dated: October 11, 1977

By /s/ RONALD YANK

Ronald Yank
Attorneys for Plaintiffs

Appendix G

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In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 700 048

Wayne Minnick, et al.,
Plaintiffs,
vs.
California Department of Corrections, et al.,
Defendants.

[Filed October 11, 1977]

PERMANENT INJUNCTION

To: California Department of Corrections; Jeri J. Enomoto, Director of the California Department of Corrections; and Their Officers, Agents, Servants and Employees, and all Persons Acting in Concert With Them:

The above-entitled matter came on regularly for trial, which trial commenced on August 23, 1976. The trial on the issue of liability was concluded in October, 1976; the

parties submitted Post-Trial Briefs; and oral argument was held subsequent to the submission and consideration of same on November 23, 1976.

The Court having heard the testimony, received the oral and documentary evidence, and having considered oral and written arguments offered by the respective parties, and having issued its NOTICE OF INTENDED DECISION, filed herein on January 5, 1977, and good cause appearing:

IT IS HEREBY ORDERED that defendants, California Department of Corrections, Jeri J. Enomoto, Director of the California Department of Corrections, and their officers, servants, and employees, and each of them, and all persons acting in concert or participating with such parties, entities or person, shall be, and they hereby are, enjoined and restrained from engaging in, committing, or performing, directly or indirectly, or by any means whatsoever, any and all of the following acts:

(1) From hiring or promoting any employee in the Department of Corrections in which preference, advantage, or benefit is given to race, color, sex, or national origin.

(a) Provided, however, that nothing in this Order shall prevent any person, in determining the assignments and job responsibilities of employees of the Department of Corrections, from considering, among other relevant factors, the race and sex of the employees in question.

(b) Provided, however, "male only," "female only," and bi-lingual certifications may be requested and/or granted when the job-related aspect of the certification can be objectively and demonstrably shown and established.

(2) From taking any action against any plaintiff in this action, any witness who testified in the trial or other hearings in this action, or any person who participated in or cooperated in any way in the prosecution of this action, or from imposing any detriment whatsoever upon any such person or party or entity for such involvement in this suit, including the encouraging of persons to take action against any such person or party or entity for such involvement in this action.

Dated: October 11, 1977

By /s/ BYRON ARNOLD
Judge of the Superior Court

Approved as to form:

Howard, Prim, Rice,
Nemerovsky, Canady & Pollak

Dated: October 11, 1977

By /s/ STUART R. POLLAK
Stuart R. Pollak
Attorneys for California
Department of Corrections and
Jeri J. Enomoto

Approved as to form:

Office of the Attorney General

Dated: October ...., 1977

By /s/ GORDON ZANE

Gordon Zane
Attorneys for the State
Personnel Board and State of
California

Approved as to form:

Carroll, Burdick & McDonough

Dated: October 11, 1977

By /s/ RONALD YANK

Ronald Yank
Attorneys for Plaintiffs

Appendix H

United States Code Service, L. Ed., USCS Constitution, Amendment 14, pgs. 444-445:

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code Service, L. Ed., 42 USCS § 1981, pgs. 262-63:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. (R. S. § 1977.)

United States Code Service, L. Ed., 42 USCS § 1983, p. 319:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. § 1979.)

United States Code Service, L. Ed., 42 USCS §§ 2000e, *et seq.*, pgs. 120, *et seq.*

§ 2000e-2. Discrimination because of race, color, religion, sex or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

. . .

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . .

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group be-

cause of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Deering's California Codes, Government Code Annotated, Cal. Const. A. 1, § 7, pg. 613:

[Privileges and immunities]

No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

Deering's California Codes, Government Code Annotated, Cal. Const. A. 1, § 8: pg. 42:

§ 8. [Discrimination on basis of sex, race, etc.]

A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.

Deering's California Codes, Gov. C.A. § 50084, pg. 444:

§ 50084. Hiring practices in conformity to federal act

Each local agency's hiring practices and promotional practices shall conform to the Federal Civil Rights Act of 1964 [28 USCS § 1447; 42 USCS §§ 1971, 1975a-1975d, 2000a-2000h].

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Supreme Court, U.S.
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NOV 1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

On Writ of Certiorari to the California Court of Appeal, First Appellate District

JOINT APPENDIX

PETITION FOR CERTIORARI FILED FEBRUARY 6, 1980

CERTIORARI GRANTED JULY 2, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7682

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Health and Welfare Agency
State of California

MEMORANDUM

Date: July 1, 1974

Subject: Department of Corrections' Affirmative Action Plan

From: Department of Corrections
Sacramento, California 95814

Attached is the Affirmative Action Plan for the Department of Corrections. This plan is developed in compliance with the Equal Employment Opportunity Act of 1972, according to guidelines established by the United States Department of Justice for all law enforcement and correctional agencies.

I expect your full cooperation and commitment to the implementation of this Plan in the true spirit of the law. The objectives, goals and time frame herein reflect the LEAA formula for work force parity—they are realistic and obtainable.

The California Department of Corrections' Affirmative Action Plan is effective July 1, 1974 with a target date for obtaining the established goals by June 30, 1979. It is required that the Departmental Affirmative Action Plan be supplemented by plans developed within each institution and parole region utilizing LEAA guidelines. Said plans should be submitted to Central Office by September 1, 1974.

Should you have any questions regarding the implementation of this Plan and/or need assistance developing your plan, contact Mr. E. L. Bullock, Supervisor, Human Relations Section.

/s/ R. K. Procunier
R. K. PROCUNIER
Director of Corrections

Attachment

cc: Regional Administrators
Executive Staffff

[1] California Department of Corrections

AFFIRMATIVE ACTION PROGRAM

June 30, 1974

It is the policy of the Department of Corrections to provide equal employment opportunities for all persons on the basis of merit and fitness and to prohibit discrimination based on race, sex, color, religion, national origin, or ancestry in every aspect of personnel policy and practices in the employment, career development, advancement and treatment of employees.

In order to insure compliance with equal employment opportunity laws and departmental policy, a revised, formal Affirmative Action Program has been developed for immediate implementation. Specific actions required by this plan will include:

A. Increase the number of minorities and women employees at all levels by implementing programs for recruiting, selecting, hiring, and promoting minorities and women.

B. Establish a monitoring system of all employment practices related to the employment of women and minorities.

C. Establish specific goals, timetables and records for measuring success or failure in complying with laws of non-discrimination.

D. Provide in-service training that will develop a sensitivity in staff to recognize and positively deal

with discriminatory practices, and provide training for women and minority employees that will assure their full participation at all levels of employment.

E. Insure that all employees have equal employment opportunities and equal treatment.

F. Insure that each institution, parole region and Central Office develop an Affirmative Action Plan that is in keeping with the departmental guidelines.

G. Insure that disciplinary action will be taken, as in any violation of major departmental policy in instances where Administrators or individuals give inadequate cooperation [sic] obstruct the goals of the program.

[2] The Director has placed responsibility for implementing and monitoring the Affirmative Action Program with the Supervisor, Human Relations Section and the Assistant Director, Womens Affairs. They will make regular reports to the Director as to departmental progress towards achieving the stated goals.

All employees of the Department of Corrections are expected to commit themselves to the accomplishment of the goals of the Affirmative Action Program.

[3] Attachment 1

California Department of Corrections

AFFIRMATIVE ACTION PROGRAM

Roles and Responsibilities

This section establishes general guidelines for the implementation of the Affirmative Action Program within the existing organizational structure and outlines roles and responsibilities at various levels of involvement in the program. Specific action steps relating to these roles appear in the Affirmative Action Plan.

A. *The Director of Corrections*

Primary responsibility for the Affirmative Action Program rests with the Director of Corrections. The Director will:

1. Approve said policy and establish the general climate for program activity.

2. Support the drive for positive implementation by delegation of authority, organization and resource allocation.

3. Review and analyze the impact of departmental policy and directives, and plans to overcome identified problems.

4. Evaluate overall program effectiveness and hold subordinate managers and program staff accountable for results.

B. *Deputy Directors, Assistant Directors, Division Chiefs*

Deputy Directors, Assistant Directors and Division Chiefs will be accountable for the effectiveness and results of the program within their line-operations or divisions. They will insure departmental policy and practices, as they relate to the Affirmative Action Program, are understood, and compliance by line-operation and division staff. Each Deputy Director, Assistant Director and Division Chief will assign an Administrator, who will with the assistance of the Human Relations Sections and the Assistant Director, Womens Affairs:

1. Analyze the work force of his or her line-operation or division to identify jobs and units where minorities and women are underutilized.

2. Develop and implement an Affirmative Action Plan for his or her administrative unit to correct [4] identified deficiencies through specific, measurable, attainable hiring and promotional goals with target dates in each area of underutilization. The line-operation plan will be augmented by local plans. Each institution and parole region, with assistance from the Human Relations Section, will develop individual plans based on an evaluation of their work force. The Deputy Director will review and approve the plan for his respective line-operation.

3. Assure that each manager within the division is responsible and accountable for meeting specific goals.

4. Develop and implement upward mobility potential of minorities and women.

5. Develop a reporting system to monitor and measure progress at least quarterly. If the results are not satisfactory to meet goals, find out why and take necessary corrective action.

C. *The Assistant Director, Womens Affairs*

The Assistant Director, Womens Affairs, under the direct supervision of the Director of Corrections, shall have authority and responsibility for the following duties:

1. Develop policies and assist in implementing equal participation of women in the programs and goals of the Department of Corrections.

2. With the Human Relations Supervisor, provide the apparatus necessary for the identification, collection and analysis of the data needed to monitor the implementation of the Affirmative Action Program for women in areas such as recruitment, selection, job assignment, promotion, pay, and terminations.

3. Establish positive liaison and communication with all levels of staff including the Human Relations Supervisor, Human Relations Committees, and Affirmative Action Representatives.

4. Provide, for women employees, a channel of communication and link to the Director should the normal modes of grievance fail, insuring women's viable participation as employees.

5. Coordinate, assist in implementing and promoting training of all staff in the Department's goals and policies regarding women while providing opportuni-

ties for increased understanding of the needs and rights of women employees.

[5] 6. Assure that an atmosphere is created and opportunities provided for women employees to participate in all areas of training, including management development and in career development assignments.

D. *Managers and Supervisors*

All management levels, including first-line supervisors, must provide program support and take every positive action necessary to assure and advance equal opportunity at their respective level.

1. Insure that all persons are given full equal opportunity and treatment in placement, training, work assignments, transfers and other personnel actions.

2. Take action as needed in such areas as realignment of job duties for staff development, assessment of training needs, and use of work assignments to improve employment and promotional opportunities for minorities and women.

3. Know the purpose, goals, and objectives of the Affirmative Action Program, and coordinate actions with the Human Relations Section, Central Office, and the Assistant Director, Womens Affairs.

E. *Supervisor, Human Relations Section*

The Supervisor, Human Relations Section, under the direct supervision of the Assistant Director, Personnel Management, and Training Division, shall have authority and responsibility for the following duties:

1. Provide active staff leadership in the development and implementation of the Affirmative Action Program.

2. Develop policy statements and prepare goals, procedures, regulations, and reports for the department's Affirmative Action Program.

3. Provide guidance and assistance to the institutional and parole division Human Relations Committees relative to their role in the Affirmative Action Program, and maintain ongoing communication with the Affirmative Action Representative.

4. Serve with the Assistant Director, Womens Affairs as liaison between the department and compliance agencies, minority organizations, women's organizations, and community action groups concerned with employment opportunities for minorities and women.

5. Coordinate the department's participation in manpower programs as they relate to the hiring of new staff.

[6] 6. Provide information, guidance, and assistance to local Administrators and related personnel on Affirmative Action and developing recruiting plans.

7. Provide assistance to the Departmental Training Officer and local Training Officers in developing training relative to human relations and affirmative action.

8. Review the department's programs and procedures related to personnel activities and make recom-

mendations for any changes necessary to remove barriers to attainment of equal employment opportunity.

9. Develop procedures with the Assistant Director, Womens Affairs for the receipt and the investigation of allegations and complaints by individuals, organizations, employees, or other third parties of discrimination on grounds of race, color, sex or national origin.

10. Provide for the exit interviews of all minority and female staff leaving the employment of the department.

11. Evaluate the effectiveness and sufficiency of the Affirmative Action Program and submit recommendations for improvement and correction where necessary. Report regularly to the Director on Affirmative Action.

F. *Affirmative Action Representatives*

Each division, institution, and parole region shall appoint an Affirmative Action Representative, no less than the Associate Superintendent or Parole Administrator I level, to assist the local administrators with the implementation of the Affirmative Action Plan.

The institutional and parole regional Affirmative Action Representatives will be seated on the existing Human Relation Committees as Exofficio Members. The duties in concert with the Human Relations Committees will include:

1. Maintaining continuous familiarity with conditions and circumstances affecting affirmative action within the department.

2. Providing active staff leadership to the program, especially in the development and implementation of the local Affirmative Action Plan.

3. Develop a recording system for management to monitor program effectiveness; make recommendations for change or improvement in their Affirmative Action Plan, personnel practices and other management [7] activities which have impact on the Affirmative Action Program.

4. Keeping management informed of affirmative action progress and problems, conditions in the community that affect employment and opportunities for management to take an even more active part in affirmative action activities.

5. Provide a point of contact for coordination and liaison between management and program staff, various organization units, special interest groups and organizations, community leaders, etc., to keep these groups informed and to assist in getting maximum impact through concerted activities, pooling of resources, etc.

6. Analyzing complaints of discrimination to identify problem areas and assist in their resolution through utilization of the existing grievance procedures or direct intervention.

7. Assist local Training Officers to develop and implement a well organized written recruitment plan for all job levels.

G. *Human Relations Committees*

Each institution and parole region shall establish a Human Relations Committee. The purpose of the Committee is to assist the Warden/Superintendent or Regional Administrator develop, implement and monitor his or her affirmative action program. The Committee will identify problems and accept staff grievances relative to race relations and sex discrimination, and make recommendations to the Warden/Superintendent or Regional Administrator for resolution of same. In order to enchance good employee relations, the Committee will focus on personnel intergroup relation problems that may ultimately have an adverse effect on the daily operation of the institution or parole region.

1. *Membership*

a. Number: minimum of nine members.

b. Minimum composition standard: 3 caucasians, 3 black and 3 spanish surnamed—at least 3 members being female.

1. The Warden/Superintendent or Regional Administrator may assign the members to represent any ethnic group of staff not mentioned above.

[8] 2. Should minimum composition standards be impossible due to insufficient number of staff in any of the above ethnic groups, positions reflecting that shortage should remain vacant until the minimum standard is met. No more than three (3) months should elapse before standards are met.

3. The Warden/Superintendent or Regional Administrator may add additional members as need dictates, however, membership should not exceed a maximum of 17, one-third of the Committee being female.

c. Structure

1. Group to elect officers.

2. Establish subcommittees as need dictates.

2. *Length of Term*

a. Membership should be a minimum of one year.

b. Terms should be staggered.

1. Some terms of initial membership may be less than one year in order to set the stagger.

2. The term for the first Chairman of the Committee should be at least one year.

3. *Authority*

Advisory to the Warden/Superintendent or Regional Administrator.

4. *Scope of Responsibility*

a. Identifying human relation problems and make appropriate recommendations to the Warden/Superintendent or Regional Administrator.

1. Individual and intergroup relationships.

2. Recruitment and retention of minority and female staff.

3. Exit interviews of all department minority and female staff.

4. Staff housing problems.

[9] 5. Identifying training needs for the development of minority and female staff.

6. Determine community related problems having a negative effect on institutional staffing and make appropriate recommendations.

b. All problems coming to the attention of the Human Relation Committees, that are of regular line responsibility will be reported to the Warden/Superintendent or Regional Administrator after:

1. Gathering of all factual information.

2. Attempts have failed to assist individual and/or individuals resolve their problem through the regular chain of command.

3. Recommendations for resolution have been formulated if the situation dictates.

If a problem cannot be resolved by the above process, said problem will be forwarded to the Director for review.

5. *Meetings*

a. Meet with the Warden/Superintendent or Regional Administrator monthly—more frequently as need dictates.

b. Chairmen to meet with Human Relations Consultants, Central Office, quarterly or more often as need dictates.

c. Chairmen to meet with the Director twice a year.

[10] Attachment II

California Department of Corrections

AFFIRMATIVE ACTION PROGRAM

Detailed Affirmative Plan

A. ADMINISTRATIVE

	Time Table	Responsibility	Target Date
1. *Objective* To make clear that the lines of authority and responsibility for administering the Affirmative Action Program do not differ from the existing departmental authority and lines of responsibility. The implementation of this program is not voluntary or optional, but a vital part of the regular job assignment of all administrative, management, supervisory, training, and personnel staff.	July 1, 1974 & continuous		
2. *Specific Action* Inform and interpret to all staff the departmental Affirmative Action Plan and the Director's policy relative to Affirmative Action.		Wardens/Superintendents Division Chiefs Regional Administrators	July 1, 1974 & continuous

B. ETHNIC BALANCE AND EQUAL REPRESENTATION OF FEMALE STAFF

1. *Objective*	Time Table	Responsibility	Target Date
To increase significantly the utilization of minorities and women across organizational units of the CDC and at all levels possible as vacancies occur.	July 1, 1974 & continuous		
[11] 2. *Specific Action*			
a. Develop recruitment plans and public relations activities with specific focus on minority communities, organizations, and women organizations, to inform them of career opportunities within CDC and the desire to employ minorities and women.		Human Relations Consultants Deptl. Training Officer Local Training Officers Local Affirmative Action Representatives HRC Committee Members	July 1, 1974 & continuous
b. Increase departmental efforts to employ minorities and women to achieve the percentages shown below per LEAA guidelines within five (5) years. "A significant disparity between minority representation in the service population and the minority representation in the Agency workforce may be deemed to exist if the percentage of a minority group in the employment of the Agency is not at least seventy (70) percent of that minority in the service population."			

	Time Table	Responsibility	Target Date
Evaluate the female representation in the Agency in comparison to women in the California labor force.			
1. To arrive at an overall of 36% minorities employed.			
2. To arrive at an overall of 38% women employed.*			
3. Proportional goals to obtain the above percentages shall occur as follows:			

[12] 2. *Specific Action*

	Non-Minorities	Minorities	
Male	40%	22%	= 62%
Female ...	24%	14%	= 38%
	64%	36%	

C. SUPPORT CATEGORY

The utilization of minorities and women in this category will be increased to obtain the goal of 36% respectively within the next five (5) years.

*Per California Labor Force, April, 1970

	Time Table	Responsibility	Target Date
1. *Objective* To increase the utilization of minorities and women within this category as available applicants can be recruited, certified or developed.	July 1, 1974 & continuous		
2. *Specific Action* Provide additional efforts to attract minorities and women to the following job categories.			July 1, 1974 & continuous
a. Administration		Assistant Director Personnel Mgt. & Training	
b. Professional		Division Chiefs	
c. Technical		Wardens/Superintendents	
d. Trade		Chief, Program Services	

[13] D. CLIENT SERVING CATEGORIES

The utilization of minorities and women in this category is equal to 22% minority and 6% women of total staff. Per LEAA guidelines, minority staff should comprise 36% of total staff and 38% of total staff should be women.

	Time Table	Responsibility	Target Date
1. *Objective* To increase the utilization of minorities and women in this category for vacancies and training opportunities leading to employment in this category.	July 1, 1974 & continuous		
2. *Specific Action* Increase employment efforts in the following categories for minorities and women:			
a. Teaching		Supervisors of Education	July 1, 1974 & continuous
b. Treatment		Associate Wardens/Supts. Regional Administrator	
c. Security		Associate Wardens/Supts.	
d. Chaplain		Wardens/Superintendents	
The Human Relations Section and the Assistant Director, Womens Affairs to be notified of all vacancies occurring in Central Office staff for the purpose of recruiting assistance.		Unit Supervisor	July 1, 1974 & continuous
[14] [sic] *Specific Action* The Affirmative Action Representative in each institution and parole region to be notified of all vacancies or expected vacancies before approval of new hires or commitments to hire.		Unit Supervisor	July 1, 1974 & continuous

[15] California Department of Corrections

DETAILED AFFIRMATIVE ACTION PLAN

Objective-Oriented Programs

This section will:

1. Establish specific objectives that are reasonable and obtainable.
2. Fix responsibility for the objectives.
3. Set a target date for the completion of the objectives.

A. RECRUITMENT, SELECTION, REFERRAL, AND TESTING

Objective	Responsibility**	Target Date
1. Post in minority communities and periodically inspects all posters relating to employment opportunities in the CDC.	AFFIRMATIVE ACTION REPRESENTATIVES HUMAN RELATIONS CONSULTANTS Local Training Officers Local HRC Committee Members	July 1, 1974 & continuous
2. Utilize minority & female oriented news media to publicize employment opportunities.	AFFIRMATIVE ACTION REPRESENTATIVES Local Training Officers Local HRC Committee Members	July 1, 1974 & continuous

**Primary responsibility is designated in CAPITAL LETTERS; secondary responsibility is designated in lower case letters.

	Responsibility	Target Date
3. Include the phrase "An Equal Opportunity Employer" in all advertisements placed for the CDC.	HUMAN RELATIONS CONSULTANTS AFFIRMATIVE ACTION REPRESENTATIVES Local Training Officers Local HRC Committee Members	July 1, 1974 & continuous
4. Initiate and maintain communications with minority community leaders and female leaders to develop a job information and recruitment system for employment with the CDC.	AFFIRMATIVE ACTION REPRESENTATIVES Local Training Officers Local HRC Committee Members	July 1, 1974 & continuous
[16] *Objective*		
5. Establish and maintain recruiting relations with schools and colleges with large minority enrollments.	HUMAN RELATIONS CONSULTANTS AFFIRMATIVE ACTION REPRESENTATIVES Local Training Officers Local HRC Committee Members	July 1, 1974 & continuous
6. Encourage employees to refer applicants from minority and female groups.	AFFIRMATIVE ACTION REPRESENTATIVES Local Training Officers Local HRC Committee Members	July 1, 1974 & continuous
7. Each institution will notify the Human Relations Section three weeks prior to the opening of testing for the class of Correctional Officer.	AFFIRMATIVE ACTION REPRESENTATIVES Local Training Officers	July 1, 1974 & continuous

	Responsibility	Target Date
8. Each institution will develop a written recruitment plan for Correctional Officers, the plan to include testing in minority communities and the recruitment and testing of women. This plan is to be reviewed by the Human Relations Section at least 3 weeks prior to the opening of each testing period for Correctional Officer.	AFFIRMATIVE ACTION REPRESENTATIVES Local Training Officers Local HRC Committee Members	July 1, 1974 & continuous
9. Work closely with the State Personnel Board to insure CDC test measure abilities, aptitude, specialized background knowledge, and/or skills actually required for the job.	DEPARTMENTAL PERSONNEL OFFICER	July 1, 1974 & continuous
10. Sex shall not be specified in any advertisement for employment placed by CDC except where it is a bonafied occupational qualification (BFOQ). BFOQ are not established by field units or institutions. This process must include the State Personnel Board and the Fair Employment Practices Commission.	DEPARTMENTAL PERSONNEL OFFICER	July 1, 1974 & continuous

[17] B. RECORD KEEPING AND REPORTING SYSTEMS

Personnel records will be maintained to permit assessment of the department's efforts to establish, maintain and advance its Affirmative Action policies.

1. Each institution, parole region and central office division shall monitor records of referrals, placements, transfers, and terminations at all levels to insure that the goals of the Affirmative Action Plan are met.

2. Each Deputy and Assistant Director shall require monthly ethnic/sex census reports from his/her administrative units starting July 1, 1974 to determine the degree to which the goals of the Plan are being met.

3. Each Deputy and Assistant Director shall review report results with all levels of management.

4. The monthly ethnic/sex census shall be forwarded to the Human Relations Section and Assistant Director, Women's Affairs, for evaluation and reports to the Director.

C. COMPENSATION

Objective

	Responsibility	Target Date
1. Conduct continuing review of jobs to insure that job requirements are not discriminatory.	DEPARTMENTAL PERSONNEL OFFICER Human Relations Section	July 1, 1974 & continuous
2. Insure that qualification standards for all jobs are based upon the minimum required to perform necessary duties and responsibilities.	DEPARTMENTAL PERSONNEL OFFICER	July 1, 1974 & continuous
3. Establish additional entry level positions through the Career Opportunity Development Program to increase the utilization of minorities and women.	SUPERVISOR, HUMAN RELATIONS SECTION	July 1, 1974 & continuous
4. Develop more student assistant and work study positions to expose more minorities and women college students to careers in Corrections.	DEPARTMENTAL PERSONNEL OFFICER ASSISTANT DIRECTOR, WOMEN'S AFFAIRS SUPERVISOR, HUMAN RELATIONS SECTION Local Training Officers	July 1, 1974 & continuous

[18] *Objective*	Responsibility	Target Date
5. In concert with the State Personnel Board, assure equal pay for equal work regardless of sex, age or race.	DEPARTMENTAL PERSONNEL OFFICER Supervisor, Human Relations Section Assistant Director, Women's Affairs	July 1, 1974 & continuous

D. SUPERVISION

Objective

1. Provide for orientation programs stressing Affirmative Action for all new employees. The orientation will include specific information about the Human Relations Committee of functions relative to the employee.	DEPARTMENTAL TRAINING OFFICER LOCAL TRAINING OFFICERS Human Relations Section	July 1, 1974 & continuous
2. Provide assistance to employees in need of information concerning community agencies and other CDC facilities.	LOCAL TRAINING OFFICERS HUMAN RELATIONS CONSULTANTS	July 1, 1974 & continuous
3. Develop exit interviews for all minorities and women, and other techniques to lessen minority and female employee turnover.	HUMAN RELATIONS CONSULTANTS HUMAN RELATIONS COMMITTEES	July 1, 1974 & continuous
4. Assist employees and supervisors in problem handling and solution relative to race relations and sex discrimination.	AFFIRMATIVE ACTION REPRESENTATIVE HUMAN RELATIONS COMMITTEES	July 1, 1974 & continuous

	Responsibility	Target Date
5. Assist Warden/Superintendents and Regional Administrators identify and resolve human relation problems having negative effects on employees and program efficiency.	HUMAN RELATIONS COMMITTEES	July 1, 1974 & continuous
6. Provide an effective grievance and appeal procedure to deal with employee complaints of discriminatory practices within the CDC.	SUPERVISOR, HUMAN RELATIONS SECTION ASSISTANT DIRECTOR, WOMEN'S AFFAIRS Human Relations Committees	July 1, 1974 & continuous
[19] E. TRAINING		
Objective		
1. Provide a system of educational leave with full or partial pay to train employees in work related specialties at all levels of employment with special focus on minorities and women.	DEPARTMENTAL TRAINING OFFICER Local Training Officers	July 1, 1974 & continuous
2. Establish a method of informing employees at all levels of training and promotional opportunities.	DEPARTMENTAL TRAINING OFFICER Local Training Officers	July 1, 1974 & continuous
3. Provide on-the-job training to prepare employees to meet the full requirements of their job and to provide for career growth at all levels of employment.	DEPARTMENTAL TRAINING OFFICER Local Training Officers	July 1, 1974 & continuous
4. Provide training slots in existing institutions capable of training females and minorities in the requisite skills for promotions and transfers.	DEPARTMENTAL TRAINING OFFICER Local Training Officers	July 1, 1974 & continuous

	Responsibility	Target Date
5. Encourage employees to avail themselves of training opportunities offered by community agencies.	LOCAL TRAINING OFFICERS Human Relations Committees Human Relations Consultants	July 1, 1974 & continuous
6. Include the Affirmative Action Plan in local in-service training sessions.	LOCAL TRAINING OFFICERS	July 1, 1974 & continuous
7. Provide organizational development training where appropriate within the CDC with emphasis on Affirmative Action for all management and supervisory personnel.	DEPARTMENTAL TRAINING OFFICER ASSISTANT DIRECTOR, WOMEN'S AFFAIRS SUPERVISOR, HUMAN RELATIONS SECTION	July 1, 1974 & continuous
8. Supervisors and managers will be required to attend training concerning effective supervision relative to cultural differences and Affirmative Action training.	DEPARTMENTAL TRAINING OFFICER LOCAL TRAINING OFFICERS	July 1, 1974 & continuous
9. CDC training will be provided supervisors and managers to assist in fulfilling No. 8.		July 1, 1974 & continuous

[20] F. COMMUNICATION

Objective

1. Publicize Affirmative Action Plan in internal agency communications media and departmental publications.	PUBLIC INFORMATION OFFICER Assistant Director, Women's Affairs Supervisor, Human Relations Section	July 1, 1974 & continuous

	Responsibility	Target Date
2. Insure that both minorities and women are represented in group photographs or illustrations utilized by CDC recruitment	HUMAN RELATIONS CONSULTANTS LOCAL TRAINING OFFICERS ASSISTANT DIRECTOR, WOMEN'S AFFAIRS	July 1, 1974 & continuous
3. Conduct periodic surveys of agency bulletin board to insure that the CDC Affirmative Action policy is posted.	LOCAL TRAINING OFFICERS Human Relations Committees	July 1, 1974 & continuous
4. Inform all employees in writing of the CDC commitment to equal employment opportunity. Make a copy of the Affirmative Action Plan available to all employees.	DEPUTY DIRECTORS ASSISTANT DIRECTORS Wardens/Superintendents Regional Admininistrators Division Chiefs	June 1, 1974
5. Verbally communicate to all CDC managers and supervisors the commitment of CDC to Equal Employment Opportunity.	WARDENS/SUPERINTENDENTS REGIONAL ADMINISTRATORS DIVISION CHIEFS	June 1, 1974
6. Discuss and evaluate department's EEO efforts with top and middle management.	SUPERVISOR, HUMAN RELATIONS SECTION ASSISTANT DIRECTOR, WOMEN'S AFFAIRS	Quarterly
7. Publish articles covering EEO progress reports, promotion of minorities and women in all departmental publications.	PUBLIC INFORMATION OFFICER	Quarterly or as activity or interest occupation

[21] California Department of Corrections

AFFIRMATIVE ACTION PROGRAM

Summary of Work Force Analysis

Based upon State Personnel Board statistics as of September 30, 1973, the ethnic backgrounds of Department of Corrections' personnel are about 80.2% Caucasian, 8.8% Black, 7.4% Spanish surname, 1.2% Asian, 2% Native American and 2.2% of other extraction. The comparison was made relative to the California Labor Force as reported by the U.S. Census for April, 1970. In this regard, the Department of Corrections' Caucasian personnel are represented in excess of their proportion in the State labor force, Blacks are over represented by approximately 2.5% of their expected proportion, Spanish surnames are under represented by approximately 6% of their expected proportion, while the category of other extractions are represented as expected relative to their proportion in the State labor force.

The work force of the Department of Corrections in relationship to the total Department of Corrections' inmate population, Caucasians, Asians and those of other extractions are over represented, while Black personnel comprise less than half of their expected proportion and Spanish surname personnel are approximately ⅓ of their expected proportion.

Recent guidelines by the U. S. Department of Justice indicate that an Agency's percentage of minority personnel should be at least 70% of that minority in its service (inmate population). On this basis, Black personnel should

represent at least 22.5% of the departmental work force, whereas they apparently comprise 8.8%. Similarly, Spanish surname personnel should represent 12.1%, but actually comprise 7.4%. Native American personnel should comprise .7%, while they actually make up .2%. Only the Asian and other extraction are represented in accord with the guidelines.

Ethnic and sex distributions were further examined according to the job assignments of personnel to:

1. Administration/field parole
2. CDC institutions

It appears that Black and Asian personnel are more frequently found in administrative/field parole rather than in CDC institutions. The percentage of Spanish surname personnel in administration/field parole is 1% higher than Spanish surname personnel in the institutions, 8.2% and 7.2%, respectively. Native Americans represent .3% in administrative/field parole and .2% in the institutions; however, the actual number of personnel is four (4) in administration/field parole and fourteen (14) in CDC institutions.

Data breakdowns by individual Department of Corrections institutions reveal that the highest proportion of non-Caucasian personnel exist [22] at CIM, CIW and CRC. Each of these institutions have a minority staff of approximately 23% or more. Relatively small proportions of non-Caucasian personnel exist at SCC, CMC and Folsom, each of which have a minority percentage of less than 10%. With the exception of CIW, CRC shows the largest proportion of female personnel at 16.2%.

The monthly weighted average salary is highest ($1,204.62) for Asian personnel, followed by Caucasians ($1,091.71), Native Americans ($1,021.50), Black ($998.98) and Spanish surname personnel ($970.91).

The occupational categories of personnel were examined in relation to their ethnic background and sex. Among support staff (not providing direct services to inmates), all ethnic minorities show their greatest representation in the clerical category. Blacks are most under represented in the technical job category, while Spanish surname personnel are most under represented in administrative and subprofession categories. The Native American is almost totally represented in the clerical category showing only 16.7% of their representation in the trade categories.

Among client serving staff (providing direct services to inmates), personnel of Asian descent are under represented in the category of security and over represented in the treatment category. Black personnel are under represented in the category of security while the Spanish surname personnel are under represented in the treatment category. Native Americans and other extractions show a disproportionately high percentage of their total representation in the category of security.

During the 6-month period ending September 30, 1973, about 28.4% of the departmental personnel was appointed to positions and 6.5% were separated. The ratio of appointments to separations was highest for the "other" extractions at 6.7% followed by Blacks at 4.9%.

The breakdown of the appointment statistics revealed that there were 356 promotions in the department during

this same 6-month period. Caucasian personnel comprised 81.2% of those employees promoted while Spanish surname and Black personnel were represented by 8.4% and 8.1%, respectively.

SEX

In the total labor force in California, 38.1% are female; Department of Corrections' personnel reflect a total of only 17.3%. Department of Corrections' inmate population is 3.2% female, but if women are to be hired without consideration of the service (inmate) population, then this percentage is not meaningful.

When clerical staff is excluded from the 17.3% above, it is found that only 8% of the CDC personnel is female. The total number of CDC women is 1322, but 775 are clerical workers. Thus, of a total work force of 7,633, only 547 women are employed in non-clerical positions; this represents approximately 42% of CDC females. An [23] obvious disparity exists, therefore, between male and female CDC employees.

In terms of ethnic origins of males and females, very little difference exists. Slightly less female Caucasians than male Caucasians are employed in the field and slightly more in the institutions. Blacks and Spanish surname males and females fare better in the field than in the institutions. Spanish surname women in both field and institution are under represented. Asian women are better represented in the field than men.

The institution employing the most females is CIW (66.7%), with CRC (16.2%), CCC (12.6%), and CMF (11.7%) following. The span between the facility with the

highest percentage of females (CIW—66.7%) and the lowest (Folsom—5.6%) is 61.1%. The span with regard to ethnic minorities is 26.6%. Figures breaking out clerical/non-clerical will be included in each local Affirmative Action Plan.

The average monthly salary for males in CDC is $1,091.71, for females it is $795.01. These figures are indicative of the fact that 58% of the CDC females and .08% of the males are clerical workers; the expected monthly salary would naturally be lower for females.

In terms of support staff in CDC, the overwhelming majority of women (76.5%) are employed in the clerical field. The next highest is in the professional field (11.2%). However, 9.5% of these women are in the accounting/budget/business sub-category. In administrative positions, males are represented 11.9% and women only .5%. The only area with a comparable representation is in the subprofessional category.

When men and women are compared not with themselves but with total CDC, a great disparity is shown. Females comprise only .02% of the total administrative staff, 22% of the total professional staff, 40% of the subprofessional staff, 21.1% of the technical staff, 4.6% of the trade employers, and 93.6% of the clerical staff. With the exception of clerical and subprofession, women are extremely under represented in support staff equal to their representation in society.

In client-serving staff, 67.3% of the women are located in the Lieutenant/Sergeant/Correctional Officer categories, and 28.4% in the treatment categories. At the supervisory

levels, women are less well represented than men, with 6.8% of the males at supervisor/Captain level and only 2.6% of the females. At the PA III level there are 1.8% males and only .6% females.

When female representation is compared with the total staff, it is clear that they are under represented in all areas. Among teachers in CDC, 94.7% are male, 91.5% of the treatment staff are male, with 97.8% of the males in the PA III category.

The best representation of females in the treatment category is in the Correctional Counselor series with 9.1%. Only 2.4% of all supervisors/Captains are female, and only 5.8% of the Lieutenant/Sergeant/Correctional Officer categories are female. When females are [24] represented at all, they are better represented at the lower levels (Parole Agent I, Correctional Counselor and Lieutenant/Sergeant/Correctional Officer) than at supervisory levels. Of the 192 female Lieutenants/Sergeants/Correctional Officers represented, 142 are employed at the California Institution for Women.

The percentage of separations from CDC by females (6.4%) is higher than for males (4.0%). Given that more than one-half of the CDC females are in clerical positions, that these positions are among the lowest in pay, and that clerical positions are relatively plentiful, perhaps a higher separation rate is to be expected.

The total percentage of promotions received in 1973 is 4.63%. Of this total, 3.61% were males and 1.02% were females. It would appear that women, no matter where in

CDC, are less than ⅓ as likely as males to receive a promotion.

In summing up, the data disclosed appreciable imbalances in the ethnic and sex distributions of the California Department of Corrections' personnel. Based on guidelines by the U.S. Department of Justice, there is considerable under representation of Black and Spanish surname personnel relative to the proportions of inmates from these ethnic backgrounds in terms of monthly salary and occupational categories; major disparities are apparent among Caucasian personnel as compared to those of minority backgrounds as well as among male versus female personnel.

[25] Attachment IV

California Department of Corrections

AFFIRMATIVE ACTION PROGRAM

Statistics of Ethnic Origins

And

Sex Distribution of California Department of Corrections Personnel

[26] SCOPE AND SOURCE OF DATA

Of primary interest in this section are recent data on the ethnicity and sex distribution of California Department of Corrections' personnel, together with breakdowns according to departmental assignment, salary category, occupational category, and promotions. This information is useful for assessing the minority group status of Department of Corrections' personnel relative to that of other groups; moreover, it provides baseline data for future comparisons involving updated statistics on minority representation among Department of Corrections' personnel.

The personnel figures set forth below are based on the statistics derived from appointment and separation documents that are routinely processed by the State Personnel Board. The additional data shown in Tables 1A and 1B are based on the April, 1970, census reports and on statistics maintained on the Department of Corrections' inmate population by the Deparement of Corrections' Research Division.

ETHNIC ORIGIN

Table 1A places the ethnic distribution of the Department of Corrections' personnel in perspective against those of the total California Labor Force population and the Department of Corrections' inmate population. The first aspect worth noting is that Department of Corrections' personnel as of September, 1973, are represented by about 80% Caucasians and 20% minorities; the latter include about 8.8% Black, 7.4% Spanish surname, 1.2% Asian descent, .2% Native American and 2.2% of other ethnic origins.

TABLE 1A

ETHNIC ORIGIN OF SELECTED GROUPS: CALIFORNIA POPULATION AS OF APRIL, 1970, CDC PERSONNEL AS OF SEPTEMBER, 1973 AND CDC INMATES EXCLUDING RGC'S AS OF DECEMBER, 1973

Ethnic Origin	California Labor Force April 1970*		CDC Personnel		CDC Inmates	
	Number	Percent	Number	Percent	Number	Percent
Caucasian	6,100,053	76.3	6,125	(80.2)	9,107	(48.8)
Black	502,057	6.3	672	(8.8)	6,019	(32.2)
Spanish Surname	1,093,904	13.7	564	(7.4)	3,235	(17.3)
Asian	= 296,154	3.7	88	(1.2)	50	(.3)
Native American			18	(.2)	181	(1.0)
Other			166	(2.2)	82	(.4)
Total	7,992,168	100.0	7,633	(100.0)	18,673	(100.0)

*Source: Summary manpower Indicators for State of California (as of April 1970), Manpower Package #1, U.S. Bureau of Census.

[27] In comparison with the California Labor Force, Department of Corrections personnel of Caucasian background are over represented by 3.9%; Blacks are over represented by 2.5%. On the other hand, the Spanish surname personnel are under represented by approximately 6.3% of their expected proportion. A somewhat different pattern emerges however when a comparison is made with Department of Corrections' inmate population. Caucasians in the department are greatly over represented relative to inmates, while Black and Spanish surname are grossly unrepresentative, having a total percentage of 8.8% and 7.5% respectively.

To provide agencies goals, equal employment opportunity guidelines have been issued by the U.S. Department of Justice.[1] They specify that the percentage of minority staff in the employment of the agency be at least 70% of the percentage of the minorities in the service (inmate) population. Thus, according to Table 1A, Black personnel should comprise 22.5% and Spanish surname personnel should comprise 12.1% of the Department of Corrections work force. As seen in Table 1A, only the personnel of Asian and other extractions meet the guidelines.

SEX DISTRIBUTION

Table 1B presents further comparison with respect to sex. It should be noted that slightly over ¾ (82.7%) of the 7,633 employees are male and less than ¼ female. Comparing the percentage of female in the California Labor Force as of April, 1970, there is an appreciable disparity of 20.8% points. There are proportionately nearly 5 times as many female Department of Corrections personnel as female inmates.

[1]*Guidelines for law enforcement agencies,* U.S. Department of Justice, August 31, 1973.

TABLE 1B

SEX OF SELECTED GROUPS: CALIFORNIA POPULATION AS OF APRIL, 1970,
CDC PERSONNEL AS OF SEPTEMBER, 1973
AND CDC INMATES EXCLUDING RGC'S AS OF DECEMBER, 1973

Sex	California Labor Force April 1970		CDC Personnel		CDC Inmates	
	Number	Percent	Number	Percent	Number	Percent
Male	4,945,195	61.9	6,311	(82.7)	18,080	(96.8)
Female	3,046,973	38.1	1,322	(17.3)	594	(3.2)
Total	7,922,168	100.0	7,633	(100.0)	18,674	(100.0)

Set forth in Table 1C are the ethnic distributions of Department of Corrections personnel classified by sex. The percentage distribution indicates that female employees are appreciably under represented among the Spanish surname according to the total proportion of this ethnic group, however, the Black and Asian descent females are over represented according to the total proportion of their respective ethnic groups. Only the percentages of Caucasian, Native American and other extraction female personnel [28] are similar to their ethnic representation among the total CDC personnel.

TABLE 1C

ETHNIC ORIGIN BY SEX OF CDC PERSONNEL
AS OF SEPTEMBER, 1973

Ethnic Origin	Total		Male		Female	
	Number	Percent	Number	Percent	Number	Percent
Caucasian	6,125	(80.2)	5,086	(80.6)	1,039	(78.6)
Black	672	(8.8)	523	(8.3)	149	(11.3)
Spanish Surnamed	564	(7.4)	491	(7.8)	73	(5.5)
Asian	88	(1.2)	55	(0.9)	33	(2.5)
Native American	18	(.2)	14	(.2)	4	(.3)
Other	39	(.5)	33	(.6)	6	(.4)
Not Reported	127	(1.7)	109	(1.6)	18	(1.4)
Total	7,633	(100.0)	6,311	(100.0)	1,322	(100.0)

ASSIGNMENT BY ETHNIC ORIGIN

Table 2A shows the ethnic distribution of CDC personnel according to job assignment: 1) administration/field parole offices throughout the State and 2) CDC institutions. The most obvious aspects in the table are that Black and Asian personnel are more frequently placed in administrative/field parole jobs rather than institutional jobs. By contrast, Caucasians are more often found in institutional assignments while there exist only a 1% difference between administration/field parole and institutional assignments for the Spanish surname.

In conjunction with Table 1A showing the ethnic background of CDC inmates, Table 2A takes on additional meaning. It is clear that relative to the percentage of CDC inmates: 1) disproportionately, numerous personnel of Caucasian and Asian descent are employed in the department, particularly in CDC institutions; and 2) disproportionately small number of Blacks and Spanish surname personnel work in the department, this disparity being most pronounced for Black personnel in CDC institutions.

TABLE 2A

ETHNIC ORIGIN OF CDC PERSONNEL BY ADMINISTRATION-FIELD PAROLE AND INSTITUTIONAL ASSIGNMENT AS OF SEPTEMBER, 1973

Ethnic Origin	Total		Administration Field Parole		Institution	
	Number	Percent	Number	Percent	Number	Percent
Caucasian	6,125	80.2	1,004	69.0	5,121	82.9
Black	672	8.8	272	18.7	400	6.5
Spanish Surnamed	564	7.4	120	8.2	444	7.2
Asian	88	1.2	45	3.1	43	0.7
Native American	18	.2	4	.3	14	.2
Other	39	.5	8	.6	31	.5
Not Reported	127	1.7	1	0.1	126	2.0
Total	7,630	100.0	1,454	100.0	6,179	100.0

[29] ASSIGNMENT AND SEX BY ETHNIC ORIGIN

Comparison of ethnic distributions according to departmental assignment and sex of CDC personnel are seen in Table 2B. Not suprisingly Caucasian females represent a much higher proportion in institutional assignments than administration/field paroles (68.4% versus 83.9% respectively). Further perusal of Table 2B brings to light several other interesting differences. First, black females, when compared to the percentage of total black personnel are evenly represented in administration/field parole, but greater than expected in institutional jobs. Second, the Spanish surname females reveal a smaller proportion than expected in both of the assignment categories.

If it is assumed that both female and male staff contribute substantially to rehabilitative programs in CDC, then it is quite apparent that more female staff are needed in all settings. Moreover, the above data indicates that there is a particular need for female personnel from minority ethnic groups in CDC institutions.

TABLE 2B

ETHNIC ORIGIN OF CDC PERSONNEL BY ADMINISTRATION/FIELD PAROLE AND INSTITUTIONAL ASSIGNMENT AS OF SEPTEMBER 1973

(In Percent)

Ethnic Origin	Administration Field Parole				Institution		
	Total	Total	Male	Female	Total	Male	Female
Caucasian	80.2	69.0	69.4	68.4	82.9	82.7	83.9
Black	8.8	18.7	18.6	18.8	6.5	6.4	7.2
Spanish Surnamed	7.4	8.2	9.2	6.3	7.2	7.5	5.3
Asian	1.2	3.1	2.1	5.2	0.7	0.7	0.9
Native American	0.2	0.3	0.3	0.2	0.2	0.2	0.5
Other	0.5	0.6	0.4	0.9	0.5	0.5	0.1
Not Reported	1.7	0.1	0	0.2	2.0	2.0	2.1
Total	100.0% (7,633)	100.0% (1,454)	100.0% (976)	100.0% (478)	100.0% (6,179)	100.0% (5,360)	100.0% (819)

Table 3A distributes the ethnic background of CDC personnel according to assignment among various institutions. Several features may be noted. First, the highest proportions 23.3%—28.3%—32.4% of non-white personnel are utilized at CRC, CIW and CIM, while relatively low proportions (less than 10%) are found at SCC, CMC, and Folsom. Second, Black personnel are largest (15%) at CIW and (11.7%) CRC, whereas comparatively low proportions are employed at SCC (.05%), CCC (1.2%), and CMC (2.2%). Third, Spanish surname personnel work [30] mostly at CCI (14.2%), CIM (11.7%), CTF (11.6%), and CIW (10.6%) these, with the exception of CTF, being southern facilities which have generally more access to Mexican Americans in the labor force, but in rather small proportions (below 5%) at CCC, SCC, S.Q. and CMF) [sic].

TABLE 3A

ETHNIC ORIGIN OF CDC PERSONNEL, BY FACILITY

(In Percent*)

Facility	Total Number	Caucasian	Black	Spanish Surnamed	Asian	Native American	Other	Not Reported
Total	6,179	82.9	6.5	7.2	0.7	0.2	0.5	2.0
CCC	253	85.8	1.2	3.1	0.4	0.4	1.2	7.9
CCI	352	78.4	4.0	14.2	0.3	.0	.0	3.1
CIM	695	67.6	8.9	11.7	0.7	.0	0.9	10.2
CIW	378	71.7	15.1	10.6	0.8	.0	0.5	1.3
CMF	696	88.4	5.9	3.7	1.2	0.7	0.1	.0
CMC	603	91.5	2.2	4.8	0.7	0.2	0.3	0.3
CRC	463	76.7	11.7	9.3	0.2	0.2	0.6	1.3
FOLSOM	498	90.4	4.6	4.2	0.4	0.2	0.2	.0
SAN QUENTIN	695	85.2	9.6	3.5	1.0	0.1	0.1	0.5
CTF	621	77.1	8.1	11.6	1.1	0.2	1.6	0.3
DVI	514	88.9	2.7	7.2	0.8	0.2	0.2	.0
SCC	411	94.2	0.5	3.2	.0	0.5	0.2	1.4

*Percentages shown for each facility are based on the Total Number as indicated in the first column.

SEX AND FACILITY

Table 3B reveals that the largest proportion (66.7%) of female personnel work at CIW, the only institution housing female inmates. Among other institutions, CRC stands out as having the largest (16.2%) work force female, followed by CIM (12.9%), CCI (12.6%) and CMF (11.6%).

[31] TABLE 3B

SEX DISTRIBUTIONS OF CDC PERSONNEL, BY FACILITY

(In Percent)*

Facility	Total Number	Male	Female
Total	6,179	86.3	13.9
CCC	253	87.4	12.6
CCI	352	89.2	10.8
CIM	695	87.1	12.9
CIW	378	33.3	66.7
CMF	696	88.4	11.6
CMC	603	90.4	9.6
CRC	463	83.8	16.2
Folsom	498	94.4	5.6
San Quentin	695	90.1	9.9
CTF	621	93.6	6.4
DVI	514	91.4	8.6
SCC	411	91.0	9.0
P&CSD	1,041	71.9	28.1

*Percentages shown for each facility are based on the total number as indicated in the first column.

SALARY BY ETHNIC ORIGIN

Shown in Table 4A are CDC personnel classified by ethnic origin and distributed according to salary categories. It is apparent that the monthly weighted average salary of the total personnel is $1,091.71 with under .7% receiving below $500 and nearly 6.2% receiving $1,500 or more. The monthly weighted average salary is higher ($1,204.62) for Asian employees followed by Caucasians ($1,116.86), Native Americans ($1,021.50), Blacks ($998.98), and Spanish surname ($970.91). It may be noted that less than 2% of the Spanish surname and 3.5% Black personnel had salaries of $1,500 or above while nearly 6.9% of the Caucasians and 9.1% of the Asian personnel earn salaries [32] in this upper range.

TABLE 4A

ETHNIC ORIGIN BY SALARY DISTRIBUTION FOR CDC PERSONNEL AS OF SEPTEMBER 1973

(In Percent)

Salary	Total	Caucasian	Black	Spanish Surnamed	Asian	Native Americans	Other
$ 499 and Under	.7	.4	1.6	.9	3.4	5.6	3.0
500- 699	9.5	9.1	12.2	6.9	25.0	22.4	11.5
700- 899	25.1	20.8	39.9	47.0	15.9	11.1	58.4
900-1,099	32.1	34.1	24.3	26.1	22.8	27.8	14.5
1,100-1,299	18.7	20.3	12.7	12.6	13.6	22.2	7.8
1,300-1,499	7.7	8.4	5.8	4.8	10.2	11.1	.6
1,500-1,699	2.3	2.6	1.3	1.2	1.1	.0	.6
1,700 and Over	3.9	4.3	2.2	.5	8.0	.0	3.6
Total Personnel	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Monthly Weighted Average Salary	$1,091.71	$1,116.56	$998.98	$970.91	$1,204.62	$1,021.50	$938.60

SALARY BY SEX

As indicated in Table 4B, the monthly weighted average salary of male personnel is $1,091.71, while that of female personnel is $795.01. Thus, the disparity in monthly weighted average salaries between the two groups is considerably greater than the maximum difference between ethnic groups (Asian and Spanish surname). Much of the disparity is accounted for by the fact that female employees are greatly over represented among the clerical classes. In this regard, 48.4% of the female personnel earned under $700 (top salary for Clerk II and related classes is $654), while only 10.2% of the male personnel earn less than this amount.

TABLE 4B

SALARY DISTRIBUTIONS BY SEX FOR CDC PERSONNEL AS OF SEPTEMBER 1973

(In Percent)

Salary	Total	Male	Female
$ 499 and Under	.7	.5	1.6
500- 699	9.5	1.6	46.8
700- 899	25.1	24.5	27.9
900-1,099	32.1	36.4	11.7
1,100-1,299	18.7	20.9	8.4
1,300-1,400	7.8	8.9	2.5
1,500-1,699	2.3	2.7	0.3
1,700-Over	3.8	4.5	0.8
Total Personnel	100.0%	100.0%	100.0%
Monthly Weighted Average	$1,040.32	$1,091.71	$795.01

[33] OCCUPATIONAL CATEGORY BY ETHNIC ORIGIN

Presented in Table 5A are occupational categories of CDC support staff-personnel who provided supportive rather than direct services to inmates classified by ethnic origin. The table reveals a number of disparities. First, all minority personnel are greatly over represented in the clerical classes; Black and Spanish surname personnel are near expected representation in the trade category, while they are under represented in the professional and technical categories. Second, Spanish surname personnel are disproportionately few in the administrative, and professional categories and Black personnel in technical categories. Black personnel loom large in the subprofessional categories. Third, the Native American is almost totally represented in the clerical category.

TABLE 5A

ETHNIC ORIGIN BY OCCUPATIONAL CATEGORIES FOR SUPPORT STAFF

Occupational Category	Total		Caucasian		Black		Spanish Surname		Asian		Native American		Other	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
ADMINISTRATION:	(172)	(7.0)	(144)	(6.0)	(17)	(11.2)	(8)	(8.6)	(2)	(4.0)			(1)	(1.7)
Director/Deputy	5	.2	5	.2										
Asst. Dir./Chief	8	.3	8	.3										
Warden/Supt.	12	.5	9	.4	1	.7			1	(2.0)			1	(1.7)
Deputy/Assoc.	36	1.4	8	.4	3	2.0	1	1.1						
Parole Admin.	38	1.5	30	1.4	5	3.3	2	2.1	1	2.0				
Program Admin.	51	2.1	66	3.2	4	2.6	4	4.3						
Field Rep./AA Rep.	16	.7	12	.6	3	1.9	1	1.1						
Special Agent	7	.3	6	.3	1	.7								
PROFESSIONAL:	(508)	(20.9)	(461)	(22.2)	(18)	(11,8)	(9)	9.7	(10)	(20.0)			(10)	(17.2)
Acct./Bdgt./Mgt./Fis.	172	7.1	155	7.5	9	5.9	4	4.3	3	6.0			1	1.7
Business Services	138	5.7	127	6.1	4	2.6	2	1.2	3	6.0			2	3.4
Medical	126	5.2	112	5.4	4	2.6	2	1.2	2	4.0			6	10.4
Research	25	1.0	22	1.0	1	.7			2	4.0				
Other	47	1.9	45	2.2			1	1.0					1	1.7
SUBPROFESSIONAL:	(77)	(3.2)	(45)	(2.2)	(18)	(11.8)	(7)	(7.5)	(1)	(2.0)			(6)	(10.4)
Intern	23	1.0	14	.7	4	2.6	1	1.1					4	6.9
Student	54	2.2	31	1.5	14	9.2	6	6.4	1	2.0			2	3.5
TECHNICAL:	(307)	(12.6)	(270)	(13.0)	(11)	(7.3)	(10)	(10.8)	(3)	(6.0)			(13)	(22.4)
Medical	307	12.6	270	13.0	11	7.3	10	10.8	3	6.0			13	22.4
TRADE:	(540)	(22.2)	(481)	(23.2)	(26)	(17.1)	(19)	(20.4)	(4)	(8.0)	(1)	(16.7)	(9)	(15.5)
Factory Mgt.	84	3.5	72	3.5	4	2.6	7	7.5					1	1.7
Agriculture	30	1.2	29	1.4			1	1.1						
Food Service	139	5.7	108	5.2	16	10.6	7	7.5	2	4.0	1	16.7	5	8.6
Maintenance	272	11.2	261	12.6	4	2.6	3	3.2	1	2.0			3	5.2
Other	15	.6	11	.5	2	1.3	1	1.1	1	2.0				
CLERICAL:	(827)	(34.0)	(671)	(32.4)	(62)	(40.8)	(40)	(43.0)	(30)	(60.0)	(5)	(83.3)	(19)	(32.8)
Supv. & Related	242	9.9	207	10.0	11	7.2	12	12.9	11	22.0			1	1.7
Clerk II & Related	545	22.4	433	20.9	48	31.6	27	29.0	16	32.0	4	66.6	17	29.3
Clerk I & Related	36	1.5	30	1.4	2	1.3	1	1.1	2	4.0			1	1.7
Temporary & Asst. Clerk	4	.2	1	.1	1	.7			1	2.0	1	16.7		
OTHER:	(2)	(0.1)	(2)	(0.1)										
Transportation Offr.	2	.1	2	.1	[sic]									
Totals	(2433)	(100.0)	(2074)	(100.0)	152	(100.0)	93	(100.0)	50	(100.0)	(6)	(100.0)	58	(100.0)

[34] Table 5B is limited to client serving staff which are defined here as those who generally provide direct services to inmates as part of their basic job function. The table indicates that Black staff tend to be appreciably over represented in the treatment category, while both Black and Spanish surname personnel are under represented among teachers. Those of Asian descent appear to be under represented in the security category, whereas they are greatly over represented in the treatment category. Spanish surname personnel shows an over representation in the security category and an under representation in the treatment classes.

Asian descent staff differ somewhat from Black and Spanish surname staff in their patterns of representation. Their proportion is about as expected among teachers, but as previously mentioned, they are greatly over represented among treatment staff and about half that expected among security staff. They are notably over represented among the Correctional Counselor, Parole Agent I, and to much lesser degree Parole Agent II and Parole Agent III. By contrast, there is no Asian staff among psychologist, therapist and para-professional classes.

TABLE 5B

ETHNIC ORIGIN BY OCCUPATIONAL CATEGORIES FOR CLIENT-SERVING STAFF FOR CDC AS OF SEPTEMBER, 1973

Occupational Category	Total		Caucasian		Black		Span. Surname		Asian		Native Amer.		Other	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
CLIENT-SERVING STAFF														
Teacher:	(242)	(4.7)	(207)	(5.1)	(16)	(3.1)	(12)	(3.1)	(2)	(5.2)			(5)	(4.7)
Supervisors	31	.6	29	.7	1	.2			1	2.6				
Academic	65	1.3	56	1.4	5	1.0	1	.2					3	2.8
Vocational	146	2,8	122	3.0	10	1.9	11	2.3	1	2.6			2	1.9
Treatment:	(1031)	(19.9)	(798)	(19.8)	(126)	(24.4)	(78)	(16.6)	(21)	(55.3)	(2)	(16.6)	(6)	(5.5)
PA III	92	1.8	70	1.7	12	2.3	7	1.5	2	5.3	1	8.3		
PA II	131	2.5	103	2.6	15	2.9	10	2.1	2	5.3			1	.9
PA I	396	7.6	285	7.1	56	10.8	44	9.4	10	26.3			1	.9
Correc. Couns. III	33	0.6	31	0.8					2	5.3				
Correc. Couns. II	73	1.4	65	1.6	6	1.2	1	0.2	1	2.6				
Correc. Couns. I	166	3.2	138	3.4	15	2.9	9	1.9	1	2.6	1	8.3	2	2.0
Psychologist	37	.7	34	.8	1	.2	1	.2					1	.9
Psychiatrist	61	1.2	53	1.3	5	1.0			3	7.9				
Therapist/ Nurse	8	.2	8	.2										
Paraprofessional	34	.7	11	.3	16	3.1	6	1.3					1	.9
Security:	(3878)	(74.7)	(3002)	(74.2)	(374)	(72.5)	(380)	(80.9)	(15)	(39.5)	(10)	(83.4)	(97)	(89.8)
Supervisor, Capt.	342	6.6	296	7.3	15	2.9	22	4.7	1	2.6	4	33.4	4	
Lieut.	186	3.6	176	4.3	2	0.4	8	1.7						
Corr. Sgt.	400	7.7	355	8.8	20	3.9	22	4.7			2	16.7	1	1.0
Corr. Officer	2928	56.4	2167	53.6	324	62.8	327	69.6	14	36.9	4	33.3	84	84.0
Correc. Offcr. Tr.	22	.4	8	.2	13	2.5	1	.2						
Other:	(37)	(.7)	(37)	(.9)										
Chaplain	37	.7	37	.9										
Totals	(5188)	(100.0)	(4044)	(100.0)	(516)	(100.0)	(470)	(100.0)	(38)	(100.0)	(12)	(100.0)	(108)	(100.0)

[35] OCCUPATIONAL CATEGORY BY SEX

It is apparent that in Table 5C, female support staff are greatly under represented in all but two of the occupational categories; the exceptions are the subprofessional category, and the clerical category, the latter being 76.5% female as compared to 3.7% male personnel in clerical classes.

TABLE 5C

SEX BY OCCUPATIONAL CATEGORIES FOR SUPPORT STAFF IN CDC AS OF SEPTEMBER, 1973

Occupational Category	Total		Male		Female	
	Number	Percent	Number	Percent	Number	Percent
SUPPORT STAFF						
Administrative:	(172)	(7.0)	(167)	(11.8)	(5)	(.5)
Director/Deputy ..	5	.2	5	.4		
Asst. Dir/Chief	8	.3	8	.6		
Warden/Superin. ..	12	.5	11	.8	1	.1
Deputy/Assoc.	35	1.4	39	2.7	2	.2
Parole Admin.	38	1.5	38	2.7		
Program Admin.	51	2.1	43	3.0	2	.2
Field Rep/AA Rep.	16	.7	16	1.1		
Special Agents	7	.3	7	.5		
Professional:	(508)	(20.9)	(395)	(27.9)	(113)	(11.2)
Acct./Bdgt/Mgt/ Fiscal	172	7.1	76	5.4	96	9.5
Bus. Svcs.	138	5.7	136	9.6	2	.2
Medical	126	5.2	123	8.7	3	.3
Research	25	1.0	14	1.0	11	1.1
Other	47	1.9	46	3.2	1	.1
Subprofessional:	(77)	(3.2)	(46)	(3.2)	(31)	(3.0)
Intern	23	1.0	14	1.0	9	.9
Student	54	2.2	32	2.2	22	2.1
Technical:	(307)	(12.6)	(242)	(17.0)	(65)	(6.4)
Medical	307	12.6	242	17.0	65	6.4
Trade:	(540)	(22.2)	(515)	(36.3)	(25)	(2.5)
Factory Management	84	3.5	80	5.6	4	.4
Agriculture	30	1.2	30	2.1		
Food Services	139	5.7	120	8.5	19	1.9
Maintenance	272	11.2	272	19.2		
Other	15	.6	13	.9	2	.2
Clerical:	(827)	(34.0)	(52)	(3.7)	(775)	(76.5)
Supervisor & Related	242	9.9	19	1.3	223	22.0
Clerk II & Related	545	22.4	31	2.2	514	50.7
Clerk I & Related .	36	1.5	1	.1	35	3.4
Temporary & Asst. .	4	.2	1	.1	3	.3
Other:	(2)	(.1)	(2)	(.1)		
Transportation	2	.1	2	.1		
Totals	(2433)	(100.0)	(1419)	(100.0)	(1014)	(100.0)

[36] With reference to clients serving the staff, Table 5D reveals that females include disproportionately few security staff and slightly more than expected treatment staff. Within the latter category, however, there is a wide variation among the different classes. For example, females are under represented among the supervisory treatment classes (Parole Agent II and III), and over represented among Parole Agent I and Correctional Counselor.

TABLE 5D

SEX BY OCCUPATIONAL CATEGORIES FOR CLIENT-SERVING STAFF FOR CDC

Occupational Category	Total		Male		Female	
	Number	Percent	Number	Percent	Number	Percent
CLIENT-SERVING STAFF						
Teacher:	(242)	(4.7)	(229)	(4.7)	(13)	(4.3)
Supervisor	31	.6	31	.6		
Academic	65	1.3	59	1.2	6	2.0
Vocational	146	2.8	139	2.9	7	2.3
Treatment:	(1031)	(19.9)	(944)	(19.3)	(87)	(28.4)
Parole Agent III	92	1.8	90	1.8	2	.6
Parole Agent II	131	2.5	124	2.5	7	2.3
Parole Agent I	396	7.6	358	7.3	38	12.4
Corr. Couns. III	33	.6	32	.7	1	.3
Corr. Couns. II	73	1.4	69	1.4	4	1.3
Corr. Couns. I	166	3.2	143	2.9	23	7.5
Psychologist	37	.7	34	.7	3	1.0
Psychiatrist	61	1.2	56	1.2	5	1.6
Nurse/Therapist	8	.2	6	.1	2	.7
Paraprofessional	34	.7	32	.7	2	.7
Security:	(3878)	(74.7)	(3672)	(75.2)	(206)	(67.3)
Supervisor/Captain	342	6.6	334	6.8	8	2.6
Lieutenant	186	3.6	175	3.6	11	3.6
Sergeant	400	7.7	386	7.9	14	4.6
Correctional Officer	2928	56.4	2761	56.6	167	54.5
Correc. Offr. Trainee	22	.4	16	.3	6	2.0
Other:	(37)	(.7)	(37)	(.8)		
Chaplain	37	.7	37	.8		
Totals	(5188)	(100.0)	(4882)	(100.0)	(306)	(100.0)

APPOINTMENTS AND SEPARATIONS BY ETHNIC ORIGIN AND SEX

Table 6A shows the percentage of total personnel who received appointments and separations from civil service classes during the six months prior to September 30, 1973. The table is further broken down for male and female personnel and by ethnic origin.

[37] TABLE 6A

APPOINTMENTS AND SEPARATIONS BY ETHNIC ORIGIN AND SEX OF CDC PERSONNEL
(AS PERCENT OF TOTAL PERSONNEL)
AS OF SEPTEMBER 1973

	Appointments			Separations		
Ethnic Origin	Total	Male	Female	Total	Male	Female
Caucasian	17.7	16.5	23.5	4.4	4.0	6.4
Black	4.0	3.5	6.4	.8	.8	1.0
Spanish Surname	2.7	2.7	3.0	.6	.6	.7
Asian	.2	.2	.6	.1	.0	.2
Native American	.1	.1	.2	.0	.0	.0
All Personnel	28.4	26.5	38.5	6.5	5.9	9.0

Viewed overall, about 28% of the departmental personnel were appointed to positions and 6.5% were separated. The corresponding Table 6B indicates that there were 2,170 appointments and 494 separations, or a net gain of 1,676 employees. Table 6A also reveals that the number of appointments is about 4.4 to 1.

TABLE 6B

NUMBER OF APPOINTMENTS AND SEPARATIONS BY ETHNIC ORIGIN AND SEX OF CDC PERSONNEL AS OF SEPTEMBER 1973

Ethnic Origin	Appointments			Separations		
	Total	Male	Female	Total	Male	Female
Caucasian	1351	1040	311	337	253	84
Black	304	219	85	62	49	13
Spanish Surname	207	168	39	48	39	9
Asian	18	10	8	5	3	2
Native American	8	6	2	0	0	0
Other	282	218	64	42	33	9
Total	2170	1661	509	494	377	117

[38] TABLE 6C

RATIO OF APPOINTMENTS TO SEPARATIONS BY ETHNIC ORIGIN AND SEX FOR CDC PERSONNEL AS OF SEPTEMBER 1973

Ethnic Origin	Total	Male	Female
Caucasian	4.0	4.1	3.7
Black	4.9	4.5	6.5
Spanish Surname	4.3	4.3	4.3
Asian	3.6	3.3	4.0
Native American	.0	.0	.0
Other	6.7	6.6	7.1
All Personnel	4.4	4.4	4.4

Compared by ethnic origin, the highest percentage (17.7%) occured among Caucasian personnel and the lowest percentage (.1%) among those of Native American descent. A similar relative difference between these groups is shown for both male and female personnel.

As seen in Table 6C, the ratio of appointments to separations was greatest (6.7%) for other extraction employees and smallest (3.6%) for Asians. The other extraction ratio was also greatest when considered for males and females, while the female Caucasian ratio of 3.7% and male Asian 3.3% are lowest.

Compared by sex, there is a 12 percentage point difference in the percentage of appointments among male and female personnel (26.5% and 38.5%). The ratio of appointments to separations show no appreciable difference for males than for females. It is quite apparent, however, that with respect to both the percentages of appointments and the ratio of appointments to separations there is more variation by ethnic group than by sex.

PROMOTIONS BY ETHNIC ORIGINS AND SEX

Featured in Table 7A, are the percentages of the total departmental personnel who were promoted April through September 30, 1973, broken down by ethnicity and sex. Since promotions account for some type of appointments, the statistics shown in this table overlap with those presented in Table 6A.

The table discloses that 4.6% of all personnel were promoted during the 6 month period. The proportion varied from about .01% for personnel of Native American and other extraction personnel to 3.7% [39] for Caucasians. Three point six (3.6%) percent of the males compared to 1.02% of the female receive promotions. Interesting, while the promotion rate among males was highest, 2.9% for Caucasians and lowest .01% for Native Americans and other extractions, the rate among females was highest for Caucasian and lowest for Asian personnel.

In subsequent statistical reports, it is anticipated that promotions among minority personnel will be analyzed in more detail according to occupational category and salary level. It will be important to determine whether the above

pattern holds true or is substantially modified when examined in this manner.

TABLE 7A

PROMOTIONS BY ETHNIC ORIGIN AND SEX
FOR CDC PERSONNEL
(AS PERCENT OF TOTAL PERSONNEL)

Ethnic Origin	Total	Male	Female
Caucasian	3.78	2.97	.81
Black	.37	.26	.11
Spanish Surname	.39	.31	.08
Asian	.07	.05	.02
Other	.01	.01	.00
Native American	.01	.01	.00
Total	4.63	3.61	1.02

TABLE 7B

NUMBER OF PROMOTIONS BY ETHNIC ORIGIN AND SEX
FOR CDC AS OF SEPTEMBER 1973

Ethnic Origin	Total	Male	Female
Caucasian	289	227	62
Black	29	20	9
Spanish Surname	30	24	6
Asian	6	4	2
Native American	1	1	0
Other	1	1	0
Total	356	227	79

[40] ATTACHMENT V

SUMMARY OF DEPARTMENT OF JUSTICE GUIDELINES FOR LAW ENFORCEMENT AGENCIES

Equal Employment Opportunity guidelines that state and local law enforcement agencies are to follow in order to qualify for financial assistance have been issued by the Department of Justice and are summarized as follows:

APPLICATION

Any state and local police agency, correctional agency, criminal court system, probation and parole agencies receiving federal financial assistance directly or through another recipient is obligated to formulate, implement and maintain an equal employment program to include the following elements:

I. Evaluation of Employment Opportunities

Essential to the development and implementation of the Equal Employment Opportunity Program is the identification and analysis of problem areas existing in the utilization of minority and women in all of the recipients employment phases (recruitment, selection and promotion). Recipient affirmative action program efforts should be coordinated with the State Personnel Board, who, by law, has responsibility for recruitment, selection and promotion of employees. The evaluation should include the following:

A. A workforce analysis shall be conducted separately for minorities and women to include all job categories.

B. An analysis of all *recruitment and selection procedures* for the preceding fiscal year shall be conducted to include test validity, recruitment methods, interview procedures, etc.

C. An analysis of seniority practices, promotions, formal and informal training procedures to assure that equal employment opportunity is being afforded to women and minorities.

D. A reasonable assessment of barriers to minority employment inherent in external factors such as lack of suitable transportation and housing desirable to the work location.

II. Written Equal Employment Opportunity Program shall include:

A. A job classification table or chart clearly indicating the assignment of employees by race, sex and national origin and including:

1. Principal duties and rates of pay for each job class.

2. Where shift assignments are utilized, the number of employees by race, sex and national origin on each shift (compared with ethnic population of general area).

[41] 3. Disciplinary actions taken against employees by race, sex and national origin within preceding fiscal year and their disposition.

4. The number of applications for employment by race, sex and national origin (if available). The

number offered employment and actually hired (if available). If not available, a system to collect above data shall be instituted.

5. The number of employees by sex, race and national origin who applied for promotions or transfers within the preceding fiscal year and results.

6. The number of terminations by race, sex and national origin for the preceding year.

7. Available labor force characteristics must be obtained and utilized.

8. In detail, clearly describe a narrative of the recipient's employment policies and practices.

9. The recipient shall develop and implement a formal comprehensive program for the recruitment of minorities.

10. The *dissemination of information* of the affirmative action program shall be to all personnel, applicants and the general public.

11. The *assignment of roles and responsibilities* to implement and administer the affirmative action program must be clear.

III. Recordkeeping and Certification

The Affirmative Action Plan and all records used in its preparation shall be kept on file for subsequent audit or review by LEAA. A certificate shall be filed by the recipient with CCCJ stating such program record.

IV. Program Monitoring and Evaluation

Recipient agencies are expected to conduct a continuing evaluation of the Affirmative Action Program. Post-award compliance reviews of recipient agencies will be scheduled by LEAA and EEO program modifications may be suggested when a significant disparity between the percentage of minority employees and the percentage of service population (70 percent of service population should be at least the percentage of minorities in the recipient's workforce). "Service" population as referred to shall be the inmate or client population served by the recipient during the preceding fiscal year.

NON-COMPLIANCE

Failure to implement and maintain an Equal Employment Opportunity Program as required by these guidelines shall subject recipients to sanctions prescribed by the Safe Streets Act and EEO regulations of the Department of Justice.

[42] Guidelines for Law Enforcement Agencies

¶ 1643

Equal employment opportunity guidelines that state and local law enforcement agencies are to follow in order to qualify for financial assistance have been issued by the U.S. Department of Justice and are reproduced below. The first of these guidelines, as amended effective August 31, 1973 (38 F. R. 23516), relates to the general equal employment opportunity responsibilities of agencies receiving such federal aid from the Law Enforcement Assistance Administration. They are codified as Title 28, Chapter I, Subpart E of Part 42 of the Code of Federal Regulations.

The second set of guidelines (38 F. R. 6415), effective March 9, 1973, is designed to assist in the elimination of illegal sex, racial and national origin bias caused by the use of restrictive minimum height job requirements.

Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE

PART 42—NONDISCRIMINATION: EQUAL OPPORTUNITY: POLICIES AND PROCEDURES

Subpart E—Equal Employment Opportunity Guidelines

By virtue of the authority vested in it by 5 U.S.C. 301, and section 501 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, as amended, the Law Enforcement Assistance Administration hereby issues Title 28, Chapter I, Subpart E of Part 42 of the Code of Federal Regulations. In that the material contained herein is a matter relating to the grant program of the Law Enforcement Assistance Administration, the relevant provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable.

Subpart E—Equal Employment Opportunity Guidelines

Sec.

42.301 Purpose.
42.302 Application.
42.303 Evaluation of employment opportunities.
42.304 Written Equal Employment Opportunity Program.
42.305 Recordkeeping and certification.
42.306 Guidelines.
42.307 Obligations of recipients.
42.308 Noncompliance.

Authority: 5 U.S.C. sec. 501 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, as amended.

§ 42.301 Purpose.

(a) The experience of the Law Enforcement Assistance Administration in implementing its responsibilities under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. (Pub. L. 90-351, 82 Stat. 197; Pub. L. 91-614, 84 Stat. 1881) has demonstrated that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States.

(b) Pursuant to the authority of the Safe Streets Act and the equal employment opportunity regulations of the LEAA relating to LEAA assisted programs and activities (38 CFR 42-201, et seq., Subpart D), the following Equal Employment Opportunity Guidelines are established.

§ 42.302 Application.

(a) As used in these guidelines, "Recipient" means any state, political subdivision of any state, combination of such states or subdivisions, or any department, agency or instrumentality of any of the foregoing receiving Federal financial assistance from LEAA, directly or through another recipient, or with respect to whom an assurance of civil right compliance given as a condition of the earlier receipt of assistance is still in effect.

(b) The obligation of a recipient to formulate, implement, and maintain an equal employment opportunity pro-

gram, in accordance with this Subpart, extends to state and local police agencies, correctional agencies, criminal court systems, probation and parole agencies, and similar agencies responsible for the reduction and control of crime and delinquency.

(c) Assignments of compliance responsibility for Title VI of the Civil Rights Act of 1964 have been made by [43] the Department of Justice to the Department of Health, Education, and Welfare, covering educational institutions and general hospital or medical facilities. Similarly, the Department of Labor, in pursuance of its authority under Executive Orders 11246 and 11375, has assigned responsibility for monitoring equal employment opportunity under government contracts with medical and educational institutions, and non-profit organizations, to the Department of Health, Education, and Welfare. Accordingly, monitoring responsibility in compliance matters in agencies of the kind mentioned in this paragraph rests with the Department of Health, Education, and Welfare, and agencies of this kind are exempt from the provisions of this subpart, and are not responsible for the development of equal employment opportunity programs in accordance herewith.

(d) Each recipient of LEAA assistance within the criminal justice system which has 50 or more employees and which has received grants or subgrants of $25,000 or more pursuant to and since the enactment of the Safe Streets Act of 1963, as amended, and which has a service population with a minority representation of 3 percent or more, is required to formulate, implement and maintain an Equal Employment Opportunity Program relating to employment

practices affecting minority persons and women within 120 days after either the promulgation of these amended guidelines, or the initial application for assistance is approved, whichever is sooner. Where a recipient has 50 or more employees, and has received grants or subgrants of $25,000 or more, and has a service population with a minority representation of less than 3 percent, such recipient is required to formulate, implement, and maintain an equal employment opportunity program relating to employment practices affecting women. For a definition of "employment practices" within the meaning of this paragraph, see § 42.202(b).

(c) "Minority persons" shall include persons who are Negro, Oriental, American-Indian, or Spanish-surnamed Americans. "Spanish-surnamed Americans" means those of Latin American, Cuban, Mexican, Puerto Rican or Spanish origin. In Alaska, Eskimos and Aleuts should be included as "American Indians."

(f) For the purpose of these guidelines, the relevant "service population" shall be determined as follows:

(1) For adult and juvenile correctional institutions, facilities and programs (including probation and parole programs), the "service population" shall be the inmate or client population served by the institution, facility, or program during the preceding fiscal year.

(2) For all other recipient agencies (e.g., police and courts), the "service population" shall be the State population for state agencies, the county population for county agencies, and the municipal population for municipal agencies.

(g) "Fiscal year" means the twelve calendar months beginning July 1, and ending June 30, of the following calendar year. A fiscal year is designated by the calendar year in which it ends.

§ 42.303 Evaluation of employment opportunities.

(a) A necessary prerequisite to the development and implementation of a satisfactory Equal Employment Opportunity Program is the identification and analysis of any problem areas inherent in the utilization or participation of minorities and women in all of the recipient's employment phases (e.g., recruitment, selection, and promotion) and the evaluation of employment opportunities for minorities and women.

(b) In many cases an effective Equal Employment Opportunity Program may only be accomplished where the program is coordinated by the recipient agency with the cognizant Civil Service Commission or similar agency responsible by law, in whole or in part, for the recruitment and selection of entrance candidates and selection of candidates for promotion.

(c) In making the evaluation of employment opportunities, the recipient shall conduct such analysis separately for minorities and women. However, all racial and ethnic data collected to perform an evaluation pursuant to the requirements of this section should be cross classified by sex to ascertain the extent to which minority women or minority men may be underutilized. The evaluation should include but not necessarily be limited to the following factors:

(1) An analysis of present representation of women and minority persons in all job categories;

(2) An analysis of all recruitment and employment selection procedures for the preceding fiscal year, including such things as position descriptions, application forms, recruitment methods and sources, interview procedures, test administration and test validity, educational prerequisites, referral procedures and final selection methods, to insure that equal employment opportunity is being afforded in all job categories;

(3) An analysis of seniority practices and provisions, upgrading and promo[44]tion procedures, transfer procedures (lateral or vertical), and formal and informal training programs during the preceding fiscal year, in order to insure that equal employment opportunity is being afforded;

(4) A reasonable assessment to determine whether minority employment is inhibited by external factors such as the lack of access to suitable housing in the geographical area served by a certain facility or the lack of suitable transportation (public or private) to the workplace.

§ 42.301 Written Equal Employment Opportunity Program.

Each recipient's Equal Employment Opportunity Program shall be in writing and shall include:

(a) A job classification table or chart which clearly indicates for each job classification or assignment the number of employees within each respective job category classified by race, sex and national origin (include for example Spanish-surnamed, Oriental, and American Indian). Also, prin-

cipal duties and rates of pay should be clearly indicated for each job classification. Where auxiliary duties are assigned or more than one rate of pay applies because of length of time in the job or other factors, a special notation should be made. Where the recipient operates more than one shift or assigns employees within each shift to varying locations, as in law enforcement agencies, the number by race, sex and national origin on each shift and in each location should be identified. When relevant, the recipient should indicate the racial/ethnic mix of the geographic area of assignments by the inclusion of minority population and percentage statistics.

(b) The number of disciplinary actions taken against employees by race, sex, and national origin within the preceding fiscal year, the number and types of sanctions imposed (suspension indefinitely, suspension for a term, loss of pay, written reprimand, oral reprimand, other), against individuals by race, sex, and national origin.

(c) The number of individuals by race, sex and national origin (if available) applying for employment within the preceding fiscal year and the number by race, sex and national origin (if available) of those applicants who were offered employment and those who were actually hired. If such data is unavailable, the recipient should institute a system for the collection of such data.

(d) The number of employees in each job category by race, sex, and national origin who made application for promotion or transfer within the preceding fiscal year and the number in each job category by race, sex, and national origin who were promoted or transferred.

(e) The number of employees by race, sex, and national origin who were terminated within the preceding fiscal year, identifying by race, sex, and national origin which were voluntary and involuntary terminations.

(f) Available community and area labor characteristics within the relevant geographical area including total population, workforce and existing unemployment by race, sex, and national origin. Such data may be obtained from the Bureau of Labor Statistics, Washington, D.C., state and local employment services, or other reliable sources. Recipients should identify the sources of the data used.

(g) A detailed narrative statement setting forth the recipient's existing employment policies and practices as defined in § 42.202(b). Thus, for example, where testing is used in the employment selection process, it is not sufficient for the recipient to simply note the fact. The recipient should identify the test, describe the procedures followed in administering and scoring the test, state what weight is given to test scores, how a cut-off score is established and whether the test has been validated to predict or measure job performance and, if so, a detailed description of the validation study. Similarly detailed responses are required with respect to other employment policies, procedures, and practices used by the applicant.

(1) The statement should include the recipient's detailed analysis of existing employment policies, procedures, and practices as they relate to employment of minorities and women, (see § 42.303) and, where improvements are necessary, the statement should set forth in detail the specific steps the recipient will take for the achievement of

full and equal employment opportunity. For example, The Equal Employment Opportunity Commission, in carrying out its responsibilities in ensuring compliance with Title VII has published Guidelines on Employee Selection Procedures (29 CFR Part 1007) which, among other things, proscribes the use of employee selection practices, procedures and devices (such as tests, minimum educational levels, oral interviews and the like) which have not been shown by the user thereof to be related to job performance and where the use of such an unvalidated selection device tends to disqualify a disproportionate number of minority individuals or women for employment. [45] The EEOC Guidelines set out appropriate procedures to assist in establishing and maintaining equal employment opportunities. Recipients of LEAA assistance using selection procedures which are not in conformity with the EEOC Guidelines shall set forth the specific areas of nonconformity, the reasons which may explain any such non-conformity, and, if necessary, the steps the recipient agency will take to correct any existing deficiency.

(2) The recipient should also set forth a program for recruitment of minority persons based on an informed judgment of what is necessary to attract minority applications including, but not necessarily limited to, dissemination of posters, use of advertising media patronized by minorities, minority group contacts and community relations programs. As appropriate, recipients may wish to refer to recruitment techniques suggested in Revised Order No. 4 of the Office of Federal Contract Compliance, U.S. Department of Labor, found at 41 CFR 60-2.24(e).

(h) Plan for dissemination of the applicant's Equal Employment Opportunity Program to all personnel, applicants and the general public. As appropriate, recipients may wish to refer to the recommendations for dissemination of policy suggested in Revised Order No. 4 of the Office of Federal Contract Compliance, U.S. Department of Labor, found at 41 CFR 60-2.21.

(i) Designation of specified personnel to implement and maintain adherence to the Equal Employment Opportunity Program and a description of their specific responsibilities suggested in Revised Order No. 4 of the Office of Federal Contract Compliance, U.S. Department of Labor, found at 41 CFR 60-2.22.

§ 42.305 Record keeping and certification.

The Equal Employment Opportunity Program and all records used in its preparation shall be kept on file and retained by each recipient covered by these guidelines for subsequent audit or review by responsible personnel of the cognizant state planning agency or the LEAA. Prior to the authorization to fund new or continuing programs under the Omnibus Crime Control and Safe Streets Act of 1968, the recipient shall file a certificate with the cognizant state planning agency or LEAA regional office stating that the equal employment opportunity program is on file with the recipient. The form of the certification shall be as follows:

I, ... (person filing the application) certify that the ..... (criminal justice agency) has formulated an equal employment opportunity program in

accordance with 28 CFR 42.301, et seq. Subpart E, and and that it is on file in the Office of ..... (name), ... (address), ... (title), for review or audit by officials of the cognizant state planning agency or the Law Enforcement Assistance Administration, as required by relevant laws and regulations.

The criminal justice agency created by the Governor to implement the Safe Streets Act within each state shall certify that it requires, as a condition of the receipt of block grant funds, that recipients from it have executed an Equal Employment Opportunity Program in accordance with this subpart, or that, in conformity with the terms and conditions of this regulation no equal employment opportunity programs are required to be filed by that jurisdiction.

§ 42.306 Guidelines.

(a) Recipient agencies are expected to conduct a continuing program of self-evaluation to ascertain whether any of their recruitment, employee selection or promotional policies (or lack thereof) directly or indirectly have the effect of denying equal employment opportunities to minority individuals and women.

(b) Post award compliance reviews of recipient agencies will be scheduled by LEAA, giving priority to any recipient agencies which have a significant disparity between the percentage of minority persons in the service population and the percentage of minority employees in the agency. Equal employment program modification may be suggested by LEAA whenever identifiable referral or selection pro-

cedures and policies suggest to LEAA the appropriates of improved selection procedures and policies. Accordingly, any recipient agencies falling within this category are encouraged to develop recruitment, hiring or promotional guidelines under their equal employment opportunity program which will correct, in a timely manner, any identifiable employment impediments which may have contributed to the existing disparities.

(c) A significant disparity between minority representation in the service population and the minority representation in the agency workforce may be deemed to exist if the percentage of a minority group in the employment of the agency is not at least seventy (70) percent of the percentage of that minority in the service population.

[46] § 42.307 Obligations of recipients.

The obligation of those recipients subject to these Guidelines for the maintenance of an Equal Employment Opportunity Program shall continue for the period during which the LEAA assistance is extended to a recipient or for the period during which a comprehensive law enforcement plan filed pursuant to the Safe Streets Act is in effect within the State, whichever is longer, unless the assurances of compliance, filed by a recipient in accordance with § 42.204(a)(2), specify a different period.

§ 42.308 Noncompliance.

Failure to implement and maintain an Equal Employment Opportunity Program as required by these Guidelines shall subject recipients of LEAA assistance to the

sanctions prescribed by the Safe Streets Act and the equal employment opportunity regulations of the Department of Justice. (See 42 U.S.C. 3757 and § 42.206).

Effective date.—This Guideline shall become effective on August 31, 1973.

DEPARTMENT OF JUSTICE
Law Enforcement Assistance
Administration
EQUAL RIGHTS GUIDELINES

Effect on Minorities and Women of Minimum Height Requirements for Employment of Law Enforcement Officers

1. *Purpose.* This guideline is issued to assist in the elimination of discrimination based on national origin, sex, and race caused by the use of restrictive minimum height requirements criteria where such requirements are unrelated to the employment performance of law enforcement personnel.

2. *Scope.* The provisions of the guideline apply to all recipients of LEAA funds. This guideline is of concern to all State Planning Agencies.

3. *Background.* The use of minimum height requirements as criteria for employee selection, assignment, or similar personnel action may tend to disqualify disproportionately women and persons of certain national origins, and races. Discrimination on the ground of race, color, creed, sex, or national origin is prohibited by the Department of Justice regulations concerning employment prac-

tices of State agencies or offices receiving financial assistance extended by the Department (28 CFR Part 42, Subpart D).

4. *Requirement.* The use of minimum height requirements, which disqualifies disproportionately women and persons of certain national origins and races, such as persons of Mexican and Puerto Rican ancestry, or oriental descent, will be considered violative to this Department's regulations prohibiting employment discrimination.

5. *Exceptions.* In those instances where the recipient of Federal assistance is able to demonstrate convincingly through the use of supportive factual data such as professionally validated studies that such minimum height requirements used by the recipient is an operational necessity for designated job categories, the minimum height requirement will not be considered discriminating.

6. *Definition.* a. The term operational necessity as used in this guideline shall refer to an employment practice for which there exists an overriding legitimate operational purpose such that the practice is necessary to the safe and efficient exercise of law enforcement duties; is sufficiently compelling to override any discriminatory impact; is effectively carrying out the operational purpose it is alleged to serve; and for which there are available no acceptable alternate policies or practices which would better accomplish the operational [47] purpose advanced, or accomplish it equally well with a lesser discriminatory impact.

b. The term law enforcement as used in this guideline is defined at section 601(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and means all activities pertaining to crime prevention or reduction and enforcement of the criminal law.

Effective date. This Guideline shall become effective on March 9, 1973.

[48] Memorandum

Heads of Agencies, Departments,
Major Units and Other Key
Personnel

Date: February 1, 1974

Subject: STATE EQUAL EMPLOYMENT OPPORTUNITY PROGRAM 74-2

From: Governor's Office

In September 1971, I issued an executive order to all Agency Secretaries, department directors, and employee organizations redefining the Code of Fair Practices for the State of California in a manner emphasizing equal opportunity and fair practices in all activities of the State. Since that date, agencies and departments have made commendable progress toward the development and implementation of affirmative action programs in all areas of the State's activity, especially employment.

I am pleased to announce, with the adoption of an Equal Employment Opportunity Policy and Affirmative Action Plan, the five-member Personnel Board has accepted the leadership responsibility to guide and evaluate the de-

velopment and implementation of the State's Affirmative Action/Equal Employment Opportunity Program.

To achieve the full purpose and intent of the Code of Fair Practices and State and Federal Equal Employment Opportunity Laws, all agencies and departments should develop and submit to the Personnel Board written equal employment opportunity policies and affirmative action plans by July 1, 1974, and provide progress reports thereafter. The Board will review these plans and progress reports to determine if they meet the guidelines promulgated by the Equal Opportunity compliance agencies to which the various departments of the State are responsible. The State Personnel Board has the resources and technical expertise to assist in the development of such plans and policies and the implementation and reporting of an effective State Equal Employment Opportunity Program.

Building on our accomplishments to date, I am assured that we can develop a State Equal Employment Opportunity/Affirmative Action Program which will meet the needs of all of the State's citizens and achieve the objective of maintaining California's leadership in the development of quality programs.

Sincerely,

/s/ Ronald Reagan
Ronald Reagan
Governor

Enclosure

SUPREME COURT, U. S.
FILED
MAR 6 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, *et al.*,
Petitioners,

CALIFORNIA DEPARTMENT
OF CORRECTIONS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, *et al.*,
Petitioners,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents California Department of Corrections, *et al.* respectfully request the Court to deny the petition for writ of certiorari seeking review of the California Court of Appeal's decision in this case. The Court of Appeal's opinion is reported at 95 Cal. App. 3d 506, *modified,* 96 Cal. App. 3d 626a, 157 Cal. Rptr. 260 (1979).

QUESTIONS PRESENTED

1. Whether the California Court of Appeal correctly applied the compelling state interest/strict scrutiny test (which Petitioners concede is the applicable constitutional standard) in upholding the constitutionality of an affirmative action program which involves no quotas or positions exclusively set aside for persons of one race or sex, but merely permits race and sex to be considered among many other factors in making hiring and promotional decisions?

2. Whether a voluntary affirmative action program which grants a limited preference in hiring and promotion to female and minority employees to eliminate traditional patterns of racial and sexual segregation within a state agency is permissible under Title VII of the Civil Rights Act of 1964 and this Court's decision in *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, ____ U.S. ____, 47 U.S.L.W. 4851 (June 27, 1979)?

STATEMENT OF THE CASE

This case involves the legality of an Affirmative Action Plan (AAP) adopted by the California Department of Corrections which grants a limited preference in hiring and promotion to minority and female employees. Relying on this Court's decisions in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (hereafter "*Bakke*"), and *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, ____ U.S. ____, 47 U.S.L.W. 4851 (June 27, 1979) (hereafter "*Weber*"), the California Court of Appeal rejected Petitioners' contention that the AAP violates the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. *Minnick* v. *California Department of Corrections*, 95 Cal. App. 3d 506, *modified*, 96 Cal. App. 3d 626a, 157 Cal. Rptr. 260 (1979). Petitioners do not contend that the decision below conflicts with *Bakke* or *Weber*. They merely assert that the Court of Appeal erred in applying the standards set forth in those cases because it misconstrued the record. Thus, although

the general subject matter of affirmative action is of considerable importance, Petitioners' claims are primarily factual and present no legal issues worthy of the Court's attention.

The Affirmative Action Plan at issue in this case was formulated in an effort both to remedy chronic discrimination within the Department of Corrections that had restricted employment and promotional opportunities for minorities and women (R.T. 338, 665, 707; Exs. "G", "Q", "R") and to lessen racial violence within California's prisons by increasing the number of minority and female correctional officers. C.T. 703, 704.[1] Under the Plan, the Department gives consideration to the composition of the work force and the race and sex of applicants when such factors are relevant to the needs of the position being filled and the other qualifications of the individual applicants. As the California Court of Appeal found (Pet. App. at A-15-A-16), no applicant is excluded from consideration for hiring or promotion under the AAP because of his or her race or sex. R.T. 195-97, 382-83, 488, 666-77, 707-08.

The petition for certiorari accuses the Department of having "set aside positions" exclusively for minorities and women. Pet. at 2; *see also id.* at 7, 16. The Superior Court made no such finding despite Petitioners' request. C.T. 617-20, 643-46. The Court of Appeal explicitly found that while race or sex is a " 'plus' in competition for promotion or transfer" (Pet. App. at A-16), the qualifications of all applicants are weighed fairly and competitively and no positions in the Department are "beyond the reach of male or nonminority employees." *Id.* The Department has never adopted—much less attempted to defend in this litigation—a policy of exclusively setting aside positions for applicants of one race or sex. While at times there has been some misunderstanding within the Department con-

[1] The record in this case consists of a Clerk's Transcript in three volumes and a Reporter's Transcript in ten. The Clerk's Transcript will be cited hereafter as "C.T." and the Reporter's Transcript as "R.T.".

cerning the AAP, when misinterpretations such as those cited by Petitioners have come to the Administration's attention, corrective measures have been taken. *See, e.g.*, C.T. 664 800-01.[2]

This action was commenced in December, 1975, when Petitioners, two white male correctional officers and the California Correctional Officers Association, filed their complaint, contending that the AAP discriminates against white males in violation of various state and federal constitutional and statutory provisions. C.T. 6-7, 69. The individual Petitioners alleged that they had been denied promotions pursuant to the AAP because they were Caucasian. C.T. 8, 10, 69-73.

During the course of pretrial proceedings, before the *Bakke* case was decided by the California Supreme Court (*Bakke* v. *Regents of the University of California,* 18 Cal. 3d 34, 132 Cal. Rptr. 680 (1976)), the Department took the position "for purposes of this litigation" that it had not engaged in an express policy of illegal or improper discrimination against individuals on the basis of race or sex; it did, however, allege that its past hiring and promotional practices and procedures had had an adverse discriminatory impact on minorities and women. C.T. 122-23. While some evidence regarding past

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[2] The recitation of evidence contained in the Petition on this point (Pet. at 7-8) is quite misleading. Among other things, Petitioners have failed to cite conflicting evidence in the record (*e.g.*, R.T. 284-85, 369-70, 378-81, 442, 494, 678-70, Ex. 10), and to point out instances in which the Department's Administration disavowed and corrected misstatements of policy. *E.g.*, R.T. 674-74, 684-86, 775-77, 800-01; C.T. 192. Petitioners also cite instances in which female only certifications have been requested from the State Personnel Board (Pet. at 7), although the Superior Court's injunction and Title VII both recognize that sex can be a bona fide occupational qualification. *See* n.6, *infra.*

discrimination within the Department was introduced at trial,[3] the Department's defense was made largely without reference to past discriminatory practices.

On January 5, 1977, the Court issued its Notice of Intended Decision, which reads in pertinent part as follows:

> "The testimony and documentary evidence herein show, and defendants admit, that defendants have carried on a campaign to, and they do now, select applicants for employment and for promotion based on their sex and on their racial background or ancestry.
>
> "Defendants seek to justify their actions on the basis that while the sex of an applicant is *one* of the factors considered, the applicant must be otherwise qualified for the duties to be performed. Sex or racial background is not the *sole* factor considered. Plaintiffs on the other hand assert that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void.
>
> "The Court agrees with plaintiffs." (C.T. 375 (emphasis in original)).

On April 5, 1977, before the trial court settled findings, the Department filed a Motion to Augment Record, requesting the Superior Court to receive evidence regarding the past and continuing discriminatory practices that the AAP was designed in part to remedy. C.T. 670-71. The Department brought this evidence before the court in the form of declarations submitted with the motion and further offered to produce live testimony

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[3] With respect to racial discrimination, *see, e.g.*, Exs. "C", at 20; Ex. "Q"; R.T. 212-13, 234, 338, 344, 370-72, 443, 681, 696-97, 706-08, 774, 824-25, 867-73, 879, 893, 903. With respect to sex discrimination, *see, e.g.*, Ex. "I"; R.T. 555-57, 608, 698.

by the declarants. C.T. 696. Defendants argued that augmentation of the record was necessary, in light of the California Supreme Court's opinion in *Bakke*, to obtain a complete understanding of the deliberate discrimination against minorities and women that necessitated the Affirmative Action Plan. C.T. 693-95.

On April 14, 1977, a hearing was held on the Motion to Augment Record. At this hearing, the court stated its belief that the evidence of prior discrimination tendered by the Department was irrelevant to the issue of whether race and sex might appropriately be considered in hiring or promotion:

> "THE COURT: Well, two wrongs don't make a right. And if they've been doing that in the past, it's high time they stopped, you see. That's all it amounts to. I don't see the relevance if they've been discriminating for generations." (R.T. 1029).

On May 5, 1977, the court denied the motion on the basis that the proffered evidence was irrelevant. At the same time, and for the same reason, the Superior Court refused the Department's request for specific findings on the past discrimination within the Department. C.T. 1192-93; R.T. 1431-33.[4]

On October 11, 1977, the Superior Court entered Findings of Fact and Conclusions of Law, a Judgment and Declaratory Judgment, and a Permanent Injunction. C.T. 1196-1216. Petitioners conceded that there was no evidence that either of the two named plaintiffs, or any other specific individual, had been

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[4] As noted above (p.5 and n.3, *supra*), the trial record contained some evidence of this prior discrimination, which would have been sufficient to sustain such a finding. Indeed, at several points, the trial court appeared to acknowledge the existence of prior discrimination, and to suggest that no further proof was necessary to establish that fact. R.T. 344, 380, 426-27, 661-62, 708, 883.

denied promotions by the Department because of their race or sex (R.T. 921), and no such finding was entered. *See* R.T. 1335-36, 1339. The Superior Court felt, however, that "discrimination against one is discrimination against all" (R.T. 1336) and concluded that the Department's employment practices violated the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e), and state statutory and constitutional provisions. C.T. 1210. Accordingly, the Superior Court issued a Permanent Injunction, prohibiting the Department "from hiring or promoting any employee . . . in which preference, advantage, or benefit is given to race, color, sex or national origin." C.T. 1214.[5] At the same time, however, based upon findings recognizing "the unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system," the Superior Court provided that race or sex could be considered by the Department in determining employee job assignments and responsibilities because such consideration was "necessary . . . to serve the compelling state interest[s] in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." C.T. 1209-10.[6]

On appeal, the California Court of Appeal reversed. *Minnick* v. *California Department of Corrections*, 95 Cal. App. 3d 506 (1979), *modified*, 96 Cal. App. 3d 626a, 157 Cal. Rptr. 260 (1979). While it found that the Superior Court's absolute proscription of consideration of race and sex in hiring and promotion had been "entirely proper" under the California Supreme Court's decision in *Bakke*, the court held that the

[5] The Court of Appeal stayed the injunction pending the Department's appeal. *See* Pet. App. at A-12.

[6] The injunction also excepted male-only, female-only and bilingual certifications when "the job-related aspect of the certification can be objectively and demonstrably shown as established." C.T. 1214.

subsequent decision of this Court in that case rendered the injunction invalid. Pet. App. at A-15. Recognizing that *Bakke* upholds race-conscious admissions programs where "race . . . does not insulate the individual from comparison with all other candidates for the available seats" (*Regents of the University of California* v. *Bakke*, 438 U.S. 265, 317 (1978)(Powell, J.), cited in Pet. App. at A-15), the court concluded, after conducting an independent review of the evidence (*id.* at A-4), that the Department's affirmative action policies "closely fit[ ]" the kind of program which *Bakke* held constitutional. *Id.* at A-15. The court found that the numerical goals contained in the AAP were not "functional quotas" of the sort condemned in *Bakke* because "[t]here was no evidence that any specific number or percentage of positions were reserved for members of either sex or of any racial or ethnic group." *Id.* at 7. Thus, the AAP did not suffer from the constitutional vice which led to the rejection of the U.C. Davis admissions program: the denial of individualized consideration to non-minority applicants.

The Court of Appeal also concluded that the AAP was "necessary to promote the compelling interest of [the] State in the proper management of its correctional system" (*id.* at A-17) because attainment of its affirmative action goals "would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." *Id.* at A-5. In so concluding, the court relied on both the evidence presented by the Department and the trial court's finding that consideration of race and sex in determining employee job assignments and responsibilities is necessary "to serve the compelling state interest[s] in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." C.T. 1210. In the eyes of the Court of Appeal, this finding "effectively determined" (Pet. App. at A-15) that the Department's AAP served the same compelling interests, for if consideration of race and sex in

transferring employees and determining their job assignments furthered these goals, the same would be true of consideration of race and sex in the related areas of hiring and promotion.[7]

The Court of Appeal thus concluded that the Department's AAP satisfied the "strict scrutiny" test because it did not foreclose male and nonminority employees from individualized consideration and because it was necessary to serve compelling state interests. *Id.* at 17. On the question of whether the AAP violated Title VII, the court held that Petitioners' claim was foreclosed by this Court's decision in *Weber*, which the court read as validating "race conscious affirmative action plans" like the AAP. Pet. App. at B-2. The Court of Appeal also reversed the Superior Court's conclusions that the Department's AAP violated other provisions of federal and state law; since the Petition does not contend that the Court of Appeal erred in these respects, there is no need to discuss these aspects of the court's opinion here.[8]

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[7] Because it viewed consideration of race and sex in hiring and promotion as *per se* unconstitutional, the Superior Court did not decide whether such consideration might be justified by the same compelling interests which it found justified consideration of race and sex in transferring employees and determining their responsibilities.

[8] Because it found that the AAP was justified by the state's compelling interest in prison management, the Court of Appeal did not consider whether the evidence relating to prior discrimination which the Department tendered with its Motion to Augment Record also justified the Department's program. It did hold, however, that the Superior Court did not abuse its discretion in denying that motion, which it (unlike the Superior Court) indicated was made too late. Pet. App. at A-23. The Court of Appeal stated, however, that were the case retried, the admissibility of this evidence could be considered anew, in light of Justice Powell's opinion in *Bakke*. *Id.*

ARGUMENT

I.

SINCE THE CALIFORNIA COURT OF APPEAL CORRECTLY FOUND THAT THE DEPARTMENT'S AAP IS CONSTITUTIONALLY PERMISSIBLE UNDER THE "COMPELLING STATE INTEREST/STRICT SCRUTINY" TEST, THE CASE PRESENTS NO IMPORTANT QUESTIONS OF LAW WHICH NEED BE DECIDED BY THIS COURT.

Petitioners acknowledge, as they must, that this Court's decision in *Bakke* permits the use of racial classifications upon a showing "that the use of [the] classification is precisely tailored to serve [a] compelling governmental interest . . . ." Pet. at 14. They also acknowledge that the Court of Appeal in this case, relying on *Bakke,* found that the Department's employment practices promoted the state's "compelling state interest in a safe and efficient correctional system . . . ." *Id.* at 12. Petitioners' quarrel with the decision below is not, therefore, that the Court of Appeal applied the wrong legal standard, but that it misread the trial court record. We shall show *infra* that this contention is meritless, but even if it were not, the claim that a lower court—particularly a state court—made erroneous factual determinations in applying a concededly correct legal standard scarcely warrants review by this Court. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925); *cf. Stone* v. *Powell,* 428 U.S. 465 (1976).[9]

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[9] Thus, contrary to Petitioners' assertion, this case does not present the question "whether a state public employer may grant preferences in hiring and promotion, based on sex or race, where there is no evidence of past employment discrimination." Pet. at 26. That question was settled by *Bakke,* which clearly holds that a state may classify by race where necessary to further a compelling state interest. *Bakke, supra,* 438 U.S. 265, 305 (Powell, J.), *id.* at 359

(footnote continued on following page)

Petitioners' assault on the Court of Appeal's opinion has three separate prongs. First, they claim that the state's concern in orderly prison management is not a compelling state interest sufficient to justify the granting of racial and sexual preferences. Pet. at 14-15. Second, they say that even if the state's interests in reducing prison violence and maintaining security are compelling, the evidence at trial did not show that the AAP promoted these interests. *Id.* at 16-19. Third, they argue that the AAP is in fact a quota system which exclusively reserves positions for minorities and women and uses impermissible benchmarks in establishing its employment goals. *Id.* at 16, 20-21. None of these arguments has merit.

In the first place, even the most casual reader of this Court's reports could scarcely be unaware of the importance which the Court consistently has attached to the state's "self-evident" interest in preserving order and authority in its prisons. *Jones* v. *North Carolina Prisoners' Union,* 433 U.S. 119, 132 (1977). The compelling nature of this interest has led the

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(Opinion of Brennan, White, Marshall and Blackmun, JJ.). While Petitioners claim that "even the . . . *Bakke*-type of preference [i.e. one which does not exclude applicants from consideration] is not constitutional in the employment context" (Pet. at 16), they offer no reasons why the use of race is constitutionally acceptable if supported by a compelling state interest in education, but not employment.

Moreover, this is emphatically not a case where there is "no evidence of past employment discrimination." Pet. at 26. As shown *supra* at pp. 5-6, the Department tendered to the Superior Court extensive evidence of its own prior discrimination which that court rejected as irrelevant. While the Court of Appeal held that the Superior Court could properly have excluded this evidence on the ground that it was tendered too late (Pet. App. at A-23), the opinion also contemplated that the evidence of prior discrimination might be relevant if the case were to be retried. *See* n.8, *supra.* Thus, even if the "per se" rule half-heartedly advanced by Petitioners were adopted so that a state employer could not use racial preferences in hiring or promotion except to compensate for prior discrimination, the Department's program would still be constitutionally acceptable.

Court on repeated occasions to accommodate constitutional guarantees to the state's interest in maintaining a safe and secure prison system. *See, e.g., Jones* v. *North Carolina Prisoners' Union, supra,* (associational rights); *Procunier* v. *Martinez,* 416 U.S. 396 (1974) (free speech: mail censorship); *Pell* v. *Procunier,* 417 U.S. 817 (1974)(free speech: press interviews); *Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978)(free speech: press access to prisons); *Adderley* v. *Florida,* 385 U.S. 39 (1966)(free speech: right of assembly on jail grounds); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974)(due process). One need not denegrate the First Amendment interest in academic diversity found compelling in *Bakke* to state that it scarcely compares, in terms of human life and limb, with the state's interest in maintaining order and security in its prisons. Petitioners' argument that this interest is insufficiently important to justify the Department's AAP must be rejected.[10]

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[10] The cases cited in text cannot be distinguished on the ground that they involve merely the constitutional rights of convicted felons, for they also hold that rights of members of the public at large may be curtailed by the compelling state interests in maintaining prison order and security. *See, e.g., Procunier* v. *Martinez, supra,* (although censorship of prison mail works a substantial restriction on First and Fourteenth Amendment rights of those who correspond with prisoners, it is justified if it furthers "one or more of the substantial governmental interests of security, order and rehabilitation." 416 U.S. at 413); *Pell* v. *Procunier, supra,* 417 U.S. at 829-35; *Adderley* v. *Florida, supra* (members of the public have no right to demonstrate on jail grounds). Moreover, other cases decided by the Court hold that governmental employees in positions closely analogous to correctional officers may find their rights substantially restricted due to the nature of their employment. *Kelley* v. *Johnson,* 425 U.S. 238 (1976) (policemen); *Parker* v. *Levy,* 417 U.S. 733, 753-57 (1974) (servicemen). Indeed, in this Court's most recent case on the rights of servicemen, it cited *Procunier* v. *Martinez, supra,* in holding that the regulations at issue there restricted speech "no more than [was] reasonably necessary to protect the substantial governmental interest." *Brown* v. *Glines,* ____ U.S. ____, 48 U.S.L.W. 4095, 4097 (January 21, 1980).

Second, Petitioners contend that "[t]he record is devoid of evidence that the racial classifications used were necessary to achieve the articulated state goal." Pet. at 21. They claim that increasing the number of minority and female correctional officers will not serve the state's compelling interest in orderly prison management because "the personal behavior of the officer towards inmates, rather than his/her race, [is] determinative" of how that correctional officer will contribute to the goal of reducing interracial prison violence. *Id.* at 17-18.

This argument—like many others in the Petition—mischaracterizes the record. There is no doubt that the ability to relate to people—of all races and both sexes—differs for different individuals. But the evidence at trial established that race or sex may be one pertinent factor, among others, affecting the ability of an individual to communicate with and to relate to members of a particular race or sex. R.T. 324-25, 343-44, 383, 445, 459-61, 478-79, 550, 564-65, 591, 620-32, 852-901. The AAP takes both individual variations and the knowledge that race or sex may bear on the ability of an individual to relate to others into account; it does so by offering *all* employees individualized consideration and giving preference to race and sex only when the preferred employee is otherwise qualified for the position under racially neutral civil service statutes and race or sex is relevant to the needs of the Department with respect to the particular position being filled. *See* pp. 3-4, *supra.* The AAP thus furthers the state's interests in prison management and security by enabling the Department to cope with what the Court of Appeal termed "the prison-related realities of race and sex." Pet. App. at A-15.[11]

[11] In upholding the AAP, the Court of Appeal also relied on the Superior Court's finding that consideration of race and sex in determining employee job assignments served the same compelling interests which the Department contends justify the AAP. Pet. App. at A-15-A-16. Petitioners attack this reliance on two grounds. First, they say that even if race and sex may be considered in determining

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Finally, Petitioners contend that the Court of Appeal mistakenly failed to recognize that the Department's AAP is a quota system which excludes white male employees from individualized consideration for hiring and promotion. They also claim that the AAP's numerical goals, which are established with reference to the inmate population (for minorities) and the statewide labor pool (for women), are unconstitutional.

But, as the Court of Appeal correctly determined, the AAP is not a quota system. *See* pp. 3-4, 8, *supra*. The Court of Appeal explicitly considered Petitioners' argument that the numerical goals in the AAP converted it into a quota system

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job responsibilities, the evidence did not support consideration of these factors in hiring and promotion because "there was no evidence that there was not already a sufficient number of minorities to fulfill the Department's needs with respect to assignments and responsibilities" without the AAP. Pet. at 18. This statement is incorrect. Particularly at supervisorial levels, there remains a pronounced absence of minorities throughout the Department. Ex. "L"; "N" at 17, 24. At some prisons the problem is especially acute. For example, at San Quentin Prison, Folsom Prison and Deuel Vocational Institution—three prisons with many extremely dangerous inmates with histories of racial violence—there were, as of the end of 1976, only two Blacks and three Mexican-Americans out of 85 custodial supervisors. C.T. 560. There are simply not enough minority correctional officers in the Department's workforce so that consideration of race and sex in transferring employees and determining job responsibilities can substitute for the AAP.

Petitioner's second argument is that consideration of race or sex in hiring and promotion is and should be subject to more exacting scrutiny than consideration of the same factors in determining job responsibilities. Even if this were true, the need for considering race and sex in hiring and promotion in the prison context serves interests which the Court has repeatedly recognized as compelling. *See* pp. 11-12, *supra*. Hence, whatever sub-level of strict scrutiny is applied to this case, the AAP passes constitutional muster.

and rejected it, holding that the goals were not quotas of the type prescribed by Justice Powell's opinion in *Bakke:*

> "Each [of the numerical goals set forth in the AAP] is an optimum 'quota' to the extent it defines a goal to be attained in the future. Neither is a functional 'quota' which now operates to place either—or any—percentage of positions in the Department beyond the reach of male or non-minority employees." (Pet. App. at A-16)

This finding is supported by substantial evidence.[12] R.T. 369-70, 380-81, 494, 678-80, Ex. 10. Along with the Court of Appeal's finding that the AAP serves compelling state interests, it also vitiates the claim that the AAP's numerical goals are impermissible. Once it is recognized that increasing the number of minority correctional officers is a constitutionally permissible response to "the prison-related realit[y] of race" (Pet. App. at

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[12] Petitioners rely heavily on the Court of Appeal's statement that:

> "[v]acancies in specific positions were *occasionally* left open, and promotions or transfers to them were *sometimes* delayed, until qualified female or minority employees could be found to fill them. Some of these positions were labeled 'female only,' or with words similarly referring to sex (including 'male only') or to race or ethnic background." (Pet. App. at A-7 (emphasis added)).

Despite Petitioners' argument to the contrary (Pet. at 6), there is no contradiction between this statement and the court's conclusion that the AAP is not a quota system. As noted at pp. 3-4 and n.2, *supra*, the Department acknowledges that positions were "occasionally" reserved for persons of a specific race or sex. But these isolated instances do not reflect the Department's policies, which have never countenanced such practices. Because the Department does not defend setting aside exclusive positions and, indeed, has taken steps to prevent this from occurring, the validity of such practices is not at issue here. What is at issue is the legitimacy of the Department's stated policies and, as the Court of Appeal correctly noted, those policies confine the use of race in accordance with the standards articulated in Justice Powell's opinion in *Bakke*.

A-15), basing the minority employment goal on the percentage of minority inmates becomes entirely logical. As for the goal for female employment, no constitutional questions are raised by basing the figure on the statewide labor pool, as opposed to the applicant flow or the labor pool in the immediate area surrounding the institutions. Even where important constitutional rights are affected, government need not use so fine a scapel. *Buckley* v. *Valeo,* 424 U.S. 1, 30 (1976). In any event, since these percentages only represent goals to be attained in the future and do not operate to exclude white male employees from consideration for hiring and promotion, the specific numbers which the Department has chosen for its employment objectives are constitutionally irrelevant. As long as no positions in the Department are beyond the reach of white male employees and the qualifications of all employees are weighed "fairly and competitively" (Pet. App. at A-16), the specific goals utilized by the Department have only the most marginal effect on non-minority, male employees.[13]

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[13] Moreover, these claims are not squarely presented by the record. The complaint in this action did not specifically assert that the AAP was unconstitutional because it contained numerical goals based on inmate population or the statewide labor force nor did the Superior Court enter any findings on these issues. Rather, both the complaint and the trial court erroneously asserted that any consideration of race or sex in hiring or promotions was unconstitutional and the case was tried on the correctness of that assertion. These claims thus come to the Court unsupported by either a timely assertion by Petitioners or illuminating findings by the trial court.

II.

BECAUSE THE CALIFORNIA COURT OF APPEAL CORRECTLY HELD THAT THE DEPARTMENT'S AAP IS PERMISSIBLE UNDER TITLE VII AND THIS COURT'S DECISION IN *WEBER*, THIS CASE RAISES NO IMPORTANT ISSUES REGARDING THE INTERPRETATION OF THAT STATUTE.

Just as *Bakke* forecloses Petitioners' claims under the Equal Protection Clause, *Weber* forecloses their claims under Title VII. Petitioners attempt, however, to distinguish *Weber* on several grounds. First, they say that as to public employees, "Title VII should be construed to incorporate the commands of the Fourteenth Amendment"; they thus argue that *Weber's* validation of affirmative action plans is inapplicable to public employers. Pet. at 22. Second, they assert that the AAP is more "intrusive upon the rights of innocent parties" (*id.* at 23) than the plan upheld in *Weber* (a) because the AAP involves preferences given to other minorities and women, as well as blacks (*id.* at 23); (b) because the AAP is not temporary, as was the program in *Weber* (*id.* at 24); (c) because the plan in *Weber* was collectively bargained while the AAP was unilaterally imposed by the Department (*id.* at 24-25); and (d) because the Department's plan places an unduly heavy burden on the expectations of white male employees. *Id.* at 25. All these attempts to distinguish *Weber* fall short of the mark.

In the first place, Petitioners cite no support for the remarkable proposition that Title VII should be construed to mean one thing for private employers and another for public employers. If *Weber* holds (as it does) that certain affirmative action plans are permissible under Title VII if adopted by private employers, similar plans are also permissible—as far as Title VII is concerned—if adopted by public ones. While public employers, though not private ones, are subject to the strictures of the Equal Protection Clause *in addition to* Title VII,

there is no warrant for Petitioners' assertion that Title VII as applied to public employers tracks the Fourteenth Amendment. Indeed, *Washington* v. *Davis*, 426 U.S. 229 (1976), upon which Petitioners otherwise rely, explicitly holds that the standards for determining a violation of the Equal Protection Clause and a violation of Title VII are quite different.

Second, the fact that *Weber* approved preferences granted to blacks while this case involves preferences granted to other minority groups and women as well as blacks is true but irrelevant. Nothing in *Weber* limits the reach of that case to affirmative action programs directed to blacks. The Court has on many occasions acknowledged that members of other minority groups and women have been subject to long-standing discrimination which is at least comparable, if not identical, to that suffered by blacks. *See, e.g., Keyes* v. *School District No. 1*, 413 U.S. 189, 197-98 (1973) (Negroes and Hispanics both suffer discrimination in education compared to whites); *Hernandez* v. *Texas*, 347 U.S. 475 (1954) (persons of Mexican descent recognized as separate class for purpose of proving discrimination in composition of grand and petit juries); *Lau* v. *Nichols*, 414 U.S. 563 (1974) (Chinese students obtained relief under Title VI of the 1964 Civil Rights Act); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (discrimination against Chinese held prohibited by Fourteenth Amendment); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) (recognizing historic discrimination against women); *Kahn* v. *Shevin*, 416 U.S. 351 (1974) (same). Indeed, as far as preferences based on sex are concerned, the constitution and Title VII permit an equal, if not a greater, range for remedial action than is the case for race. *Kahn* v. *Shevin, supra*, (remedial statute granting widows greater benefits than widowers upheld as reasonably designed to further state policy of redressing unequal burden which loss of a spouse imposes on wives); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). The fact that persons other than blacks receive the benefits of the limited preferences granted by the AAP thus furnishes no ground for distinguishing this case from *Weber*.

Third, Petitioners say this case is different from *Weber*, because here there is "no evidence that the Department's AAP is temporary . . . ." Pet. at 24. This statement is factually incorrect. The AAP at issue in this action was intended to last for five years from its inception in 1974, or until June 30, 1979. The AAP has now been succeeded by an "Equal Employment Opportunity Plan" which will be reviewed annually in accordance with California civil service regulations. The Department thus contemplates careful yearly review to insure that the limited racial and sexual preferences authorized by its policies are still needed.

Fourth, the fact that the plan approved in *Weber* was contained in a collective bargaining agreement is irrelevant. The holding of that case is that "Title VII . . . does not condemn all private, voluntary, race-conscious affirmative action plans" (47 U.S.L.W. at 4855), and nothing in the decision limits the reach of that holding to plans agreed to by a union. Accepting Petitioners' argument would lead to the paradoxical result that an employer without a union would have less freedom of action that one whose employees were unionized—a result that would doubtless surprise students of labor relations.

Finally, Petitioners assert that the AAP imposes a greater burden on the expectations of white male employees than the plan upheld in *Weber*. This is not the case. The AAP is, if anything, more moderate than the *Weber* plan. That plan reserved fifty percent of the positions in a craft training program for blacks; by contrast, the Department's program, as the Court of Appeal found, reserves no positions exclusively for employees of one race or sex, but leaves employees free to "fairly and competitively" compete for promotion. Pet. App. at A-16. Nor does the AAP "unnecessarily trammel the interests of the white employees." 47 U.S.L.W. 4855. It "does not require the discharge of white workers and their replacement with new black hires" or "create an absolute bar to the advancement of white employees." *Id.* Even with the AAP, most promotions go to white male employees. C.T. 563. Approval of the AAP under Title VII follows inescapably from the decision of this Court in *Weber*.

III.

CERTIORARI SHOULD BE DENIED BECAUSE OF THE PROCEDURAL POSTURE OF THE CASE.

Even if this case otherwise presented the issues which Petitioners claim it does, the procedural history of the case renders exercise of this Court's jurisdiction inappropriate. This is so for three reasons. First, in its present posture, this case comes to the Court with a truncated record, with much of the evidence presented by the Department as to its own prior discrimination having been excluded by the Court of Appeal on state procedural grounds. Pet. App. at A-23. Second, the case was presented to the trial court and decided by that court on the erroneous legal theory that racial and sexual preferences are "per se" unconstitutional. Because of this, neither Petitioners nor the Superior Court focused on the issues which Petitioners now claim are worthy of this Court's attention. Third, there is substantial doubt that the judgment of the Court of Appeal is a "final judgment" within the meaning of 28 U.S.C. § 1257 so as to give this Court jurisdiction.

As noted *supra* at pp. 5-6, after the trial of this matter, but before a decision had been rendered by the Superior Court, the Department proffered voluminous evidence regarding its past and present discriminatory practices. C.T. 670-981. The Superior Court refused this evidence. The Court of Appeal affirmed its ruling because the evidence was presented too late. Pet. App. at A-23. The Court of Appeal specifically stated, however, that it was not deciding whether the proffered evidence was relevant; it noted that if the case were to be retried,

"Justice Powell's decision in *U.S. Bakke* will be pertinent to the determination of [this] question." *Id.*[14]

As far as the evidence of prior discrimination is concerned, this case comes to the Court in a unique posture. This evidence is concededly relevant to the legality of the Department's AAP, for even Petitioners admit that a public employer may use racial preferences in hiring and promotion if necessary to remedy prior discrimination. Pet. at 14, 20, 27. Hence, if the case were to be retired (*see* pp. 22-23, *infra*), evidence of the Department's prior discrimination surely would be admissible, despite the fact that this evidence, as a matter of state procedural law, may now be outside the record. Even if this Court were persuaded that the issues presented by this case were worthy of consideration, it would make little sense to decide these issues on a record which contains serious deficiencies, particularly when those deficiencies may be remedied by future state court proceedings.

Second, the record in this case reflects the fact that Petitioners tried it and the Superior Court decided it on a legal theory which has since been shown to be erroneous: that racial and sexual preference is *per se* unconstitutional, no matter how compelling the interests thereby served. Thus, in this case, as in *Massachusetts* v. *Painten*, 389 U.S. 560 (1968), "the parties did not focus upon the issues now before us" and "the record is not sufficiently clear and specific to permit decision of the . . . questions involved . . . ." *Id.* at 561.

Third, there is substantial doubt as to whether the decision of the Court of Appeal below is a "final judgment" within the meaning of 28 U.S.C. § 1257 so as to give this Court jurisdic-

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[14] Petitioners state (Pet. at 20) that the Court of Appeal agreed with the Superior Court "that evidence of past discrimination was 'irrelevant' to this case," citing page 28 of their Petition's appendix. As noted in text, however, the Court of Appeal expressly refrained from deciding this issue (Pet. App. at A-23) and the statement in the petition is incorrect. It is noteworthy that Appendix A, which Petitioners cite as authority for this statement, contains no page 28.

tion. Under California law, an appellate decision reversing a trial court judgment is deemed an "unqualified reversal" which "ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings." 6 Witkin, *California Procedure* (2d ed. 1971), Appeal § 543, p.4484. Moreover, the Court of Appeal's decision may contemplate the possibility of a retrial, since it states that the relevance of the evidence of past discrimination will be decided in accordance with Justice Powell's opinion in *Bakke* if there is a retrial. Pet. App. at A-23. This Court has previously recognized that an "unqualified reversal" under California law is not a final judgment for purposes of granting this Court jurisdiction. *Gospel Army* v. *Los Angeles*, 331 U.S. 543 (1947).

The California rule is, however, subject to an exception which may be applicable to this case. Whether a new trial is permissible turns ultimately on the intent of the appellate court; thus, "when the opinion as a whole establishes a contrary intention, the rule [that 'unqualified reversal' has the effect of remanding the case for a new trial] is inoperative." *Stromer* v. *Browning*, 268 Cal. App. 2d 513, 518-19, 74 Cal. Rptr. 155, 158 (1968); *accord, Barth* v. *B.F. Goodrich Tire Co.*, 15 Cal. App. 3d 137, 92 Cal. Rptr. 809 (1971), *Salaman* v. *Bolt*, 74 Cal. App. 3d 907, 141 Cal. Rptr. 841 (1977). Thus, where an appellate court reversing a judgment in plaintiff's favor holds that the evidence is insufficient as a matter of law to establish plaintiff's claim, plaintiff must disclose what new evidence he wishes to offer to the trial court which would compel a different result (in light of the law of the case established by the appellate opinion) in order to obtain a retrial. *Stromer* v. *Browning, supra*, 268 Cal. App. 2d at 520, 74 Cal. Rptr. at 160.

The present case may well fit within *Stromer*. What the California Court of Appeal did was to weigh the evidence presented by both sides and conclude that Petitioners had not established a constitutional violation. Petitioners have never suggested, either to the California courts or to this Court, that a

different result would obtain if they were allowed to introduce new evidence; rather, they only complain that the Court of Appeal misread the evidence that they have already presented.

In this present posture of the case, therefore, the question of whether the Court of Appeal's decision constitutes a "final judgment" is murky, to say the least. Since Petitioners have the burden of proving entitlement to federal jurisdiction (*Thomson* v. *Gaskill*, 315 U.S. 442 (1942)), and since they are the ones who, if certiorari is denied, would have to establish their right to a new trial in the California courts, the burden should be on them to demonstrate the finality of the judgment which they seek to have reviewed here by unequivocably disavowing any intention to seek a retrial if certiorari is denied. Their silence on this point implies that they are attempting to have their cake and eat it too, by predicating their Petition on the theory that the Court of Appeal's decision is final, while simultaneously preserving their hopes for a retrial in the event certiorari is denied. Only if Petitioners explicitly disclaim any intent to seek a new trial will it be possible to know with the requisite assurance that the judgment under review is final. Absent such a statement, there will be no occasion for the exercise of this Court's jurisdiction.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 6, 1980.

Respectfully submitted,

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In the Supreme Court

OF THE

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OCTOBER TERM, 1979

No. 79-1213

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Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

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I

THIS CASE RAISES FUNDAMENTAL QUESTIONS WITH RESPECT TO THE SHOWING NECESSARY UNDER THE FOURTEENTH AMENDMENT TO JUSTIFY A PUBLIC EMPLOYER'S USE OF RACE AND SEX TO DETERMINE EMPLOYMENT OPPORTUNITIES ABSENT PRIOR INTENTIONAL DISCRIMINATION

This Court has not yet held that a public employer's use of race or sex in determining employment opportunities is permissible for any reason other than to remedy that employer's past intentional discrimination. Respondents' goal of achieving and maintaining a racial balance to reflect that of the inmate population served "inmate-

related objectives of the Department" (Pet. at A-5) akin to "operational needs" and "community preference" rationales continually rejected by this Court even in *Regents of the University of California v. Bakke* (hereinafter, *"Bakke"*), 438 U.S. 265 (1978) (see Pet. at 115). Respondents disclaimed, by an answer to an interrogatory, having ever engaged in any past intentional discrimination (Pet. at 5-6, Fn. 3).

If this Court were to repudiate its decision in *Washington v. Davis,* 426 U.S. 229 (1976) and hold that disproportionate impact, the mere assertion of disproportionate impact, disproportionate impact resulting from proven intentional discrimination, or judicial notice of societal discrimination, could suffice as a compelling state interest, the Court would have to adopt a new standard of scrutiny in order for Respondent's Affirmative Action Plan (hereinafter "AAP") to stand. Even the California Court of Appeal agreed that proof of past discrimination was "irrelevant" since the AAP was not adopted to, nor did it, remedy past discrimination (Pet. at A-23).[1]

If the Department's "operational needs" defense is to be accepted, then a new meaning must be given to "strict scrutiny." The Findings of Fact of the Trial Court were undisputed, upon which Findings were based the conclusions that Respondents had not justified racial and sex-based preferences in hiring and promotion, although a sufficient interest justified the use of those preferences in

[1] The Respondents admit that their "defense was made largely without reference to past discriminatory practices". Resp. at 5. In fact, the Court of Appeal noted that "the only substantial reference in the evidence" to past discrimination in the record was in response to Petitioners' Interrogatory (Pet. at A-7).

determining job assignments and responsibilities (Pet. at F 7-8). Despite the fact that no evidence is advanced, nor is there any in the record, to relate a need for the stated levels of minority and female employment to the stated objectives, the Court of Appeal merely inferred such from the Trial Court's conclusion with respect to job responsibilities and assignments (Pet. at A-15). The only other justification advanced by Respondents for the interference with Petitioners' constitutional rights in their employment is the State's "self-evident" interest, which has been held sufficient to justify the partial accommodation of *prisoners'* constitutional rights (Resp. at 11-12).

Respondents' argument that the Trial Court proceeded on the basis that any preference in hiring and promotion is *per se* unconstitutional (Resp. at 9 and 21) is completely unsupported by the record: see discussion, *infra,* at p. 6.

Finally, Respondents' arguments that the Department's AAP does not involve "functional quotas" is to no avail since even the kind of preferences deemed permissible for admissions of students in *Bakke* were deemed unlawful where positions were set aside for minorities. The record is replete with examples of positions set aside (Pet. at 7-8). The Court of Appeal noted that no "percentage of positions in the Department" were "beyond the reach of male or non-minority employees" (Pet. at A-16). Respondents distorted that statement to read "*no positions* in the Department are beyond the reach of male or non-minority employees" (Resp. at 3). However, that the rights of individuals guaranteed by the Fourteenth Amendment were

violated cannot be doubted in light of the Department's later admission:

> "The Department acknowledges that positions were 'occasionally' reserved for persons of a specific race or sex." Resp. at 15, Fn. 12.

Respondents' disclaimer notwithstanding, there was sufficient evidence for the Trial Court to find that positions were set aside unlawfully by the Department pursuant to its AAP (Finding of Fact 8, Pet. at F-4).

II

IMPORTANT QUESTIONS ARE RAISED BY THE APPLICATION OF THIS COURT'S DECISION IN WEBER TO PUBLIC EMPLOYEES

Respondents ignore this Court's express reluctance to extend the *Weber* decision to the public sector, (Pet. at 21). Clearly, if the *Weber* decision is to be extended to the public sector, it must be reconciled with the decision in *Washington v. Davis,* 426 U.S. 229 (1976) requiring proof of prior intentional discrimination by the public entity when there are claimed Fourteenth Amendment violations.

Even if it were held that (1) conclusory allegations of adverse impact, (2) proven adverse impact, or (3) proven adverse impact resulting from unintentional discriminatory practices, were sufficient to justify a public entity's adopting racial or sex-based preferences, the degree of scrutiny to which such preferences would be subjected under Title VIII would remain an open question. For example, would the scrutiny be rigid enough if, as here, preferences

granted were not adopted to remedy past discrimination by Respondents, and in fact, were "not justified by, nor did they remedy, past wrongs by society against any such minorities or women?" (Findings of Fact 13, Pet. at A-10).

Nor do Respondents dispose of the factors that this Court deemed necessary to address in *Weber*, which are noticeably absent from the instant case. As noted in the Petition (pages 23-26) the AAP in *Weber* involved only Negroes (the Court took judicial notice of specific congressional history of Title VII with respect to Negroes, as well as judicial notice of their exclusion from craft unions), was collectively bargained, did not involve setting aside promotional positions in a merit system, and was time-limited. Respondents denied Petitioners' claim of a lack of evidence with respect to the last by improperly citing facts not in the record, (Resp. at 19).

III

THE PROCEDURAL POSTURE OF THE CASE MAKES IT RIPE FOR REVIEW

The important federal statutory and constitutional rights of Petitioners, as reflected in the questions squarely presented to this Court (Pet. at 2-3), have been disposed of by the highest Court of the State of California, (Pet. at 2). The issues are of great national importance and are ripe for review.

Respondents complain that the record is "truncated," since evidence of past discrimination was excluded by the Court of Appeal on "state procedural grounds" (Resp. at 20). The Court of Appeal noted that the evidence of past

discrimination could have been excluded because the motion was "made by afterthought and much too late" (after trial and three months after the Court issued its Notice of Intended Decision, and see Resp. at 5). Furthermore, the Court of Appeal recognized that the substantive basis for the exclusion was indeed its irrelevancy. "The reasons the Court deemed it irrelevant were later stated in Finding No. 13 (see Fn. 5)", to wit, the preferences were not granted to, nor did they remedy, past discrimination (Pet. at A-23).

Respondents assert that this Court should not hear this case because the Trial Court decided the case on the erroneous legal theory, "that racial and sexual preference is *per se* unconstitutional, no matter how compelling the interest thereby served" (Resp. at 21). Even if the incorrectness of the legal theory utilized by the Trial Court were an appropriate basis for the denial, rather than the granting of the Petition, the characterization of the Trial Court's theory is a blatant misrepresentation. The phrase, "*per se* unconstitutional" is the Respondents' and not the Court's (Resp. at 9 Fn. 7 and 21). To the contrary, the Trial Court found that Respondents failed to advance sufficient evidence that the racial and sexual preferences granted were justified by, or were narrowly tailored to accomplish a compelling state interest. (See Pet. at A-10 Fn. 13).

Finally, Respondents' assertion that this Court may lack jurisdiction because under California law the decision of the Court of Appeal lacks finality within the meaning of

28 U.S.C. § 1257 is patently false.[2] Under 28 U.S.C. § 1257 whether a judgment is final is a question of "purely federal law." *Gotthill v. Sills,* 375 U.S. 79, 11 L.Ed.2d 159 (1963). Thus, the test for finality is not whether the local rules of practice denominates a judgment as final. *Department of Banking v. Pink,* 317 U.S. 264, 87 L.Ed 254, reh.den. 318 U.S. 802, 87 L.Ed. 1166 (1942); *Gospel Army v. Los Angeles,* 331 U.S. 543, 91 L.Ed. 1662 (1947). The Supreme Court gives a practical, as opposed to a technical, construction of the finality of State Court judgment, going beyond the face of the judgment to determine if the Court has, in fact, fully adjudicated rights. *Construction and General Laborers' Union v. Curry,* 371 U.S. 542, 9 L.Ed2d 514 (1963); *Gospel Army v. Los Angeles,* 331 U.S. 543, 91 L.Ed 1662 (1947). Thus, the requisite finality is satisfied where federal rights asserted are disposed of, notwithstanding the remand for further proceedings. *Carondelet Canal and Navigation Co. v. Louisiana,* 233 U.S. 562, 58 L.Ed. 1001 (1914); *Hudson Distributors, Inc. v. Eli Lilly Co.,* 377 U.S. 386, 12 L.Ed.2d 394 (1964).

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[2]At page two of the Petition, Petitioners inadvertently invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) rather than the appropriate § 1257.

In the instant case, it is clear from the Court of Appeal decision that a retrial would serve no purpose, since Findings of Fact were undisturbed and only the conclusions of the Trial Court were overturned. However, even if retrial were necessary, *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 43 L.Ed.2d 328 (1975), is dispositive. Even where an entire retrial is mandated, the *Cox Broadcasting* decision held that there was sufficient finality for Supreme Court review where, as here, the federal issue is conclusive or the outcome of further proceedings is preordained. Nothing could be more final with respect to the outcome of this case than the Court of Appeal's upholding of the use of racial and sex-based preferences in employment opportunities, including the setting aside of positions.

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Respondents.

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. May a State, absent proof that it has engaged in previous employment discrimination, voluntarily establish "goals", set aside positions, and grant preferences in public employment for the hiring and promotion of less qualified racial "minorities" and of women, to the detriment of all other applicants and employees? and,

2. Does the "safe and efficient operation of correctional facilities" constitute a sufficiently compelling State interest to justify the use of absolute racial and sex-based preferences in public hiring and promotion; if so, is proof of that State interest, after subjection to strict scrutiny, supported anywhere in this record? and,

3. Is it constitutionally sufficient for a State to adopt preferential public employment practices based exclusively upon conclusory confessions of "adverse impact" of its past policies and practices on "minorities" and women? and,

4. Is it constitutionally appropriate for a State to institute employment "goals" for "minorities", based upon prison inmate population, rather than upon the "relevant labor market" or "applicant flow"? and,

5. May the "relevant labor force" for the hiring of women be based upon state-wide employment statistics for women, as opposed to "applicant flow", or labor force statistics, for women in the "relevant geographic area" in which the various correctional institutions are located?

PARTIES

Petitioners are Wayne Minnick and Henry J. Darden, on behalf of themselves and all others similarly situated; and the California Correctional Officers Association ("CCOA" herein), a recognized bargaining agent for correctional officers, on behalf of itself and its members (C.T. pp. 2-3). Respondents are the California Department of Corrections ("Department" herein); J. J. Enomoto, in his capacity as

Director of the California Department of Corrections; Carlos Sanchez, in his capacity as Assistant Director of the Department of Corrections; and the California State Personnel Board (C.T. pp. 3-4, 66-67).

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OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 95 Cal.App.3d 506 (1979), and may be found in the Appendix to the Petition to Writ of Certiorari ("Pet.App." herein) at pp. A-1 to A-24. The modification of the Opinion, and Denial of a Petition for Rehearing, is reported at 96 Cal.App.3d 626a (1979) and may be found at Pet.App. B-1 through B-3. The Order Denying Petitioners' Petition for Hearing by the California Supreme Court is reported at 25 C.3d, Minutes 2 (Number 23, California Official Reports) and may be found at Pet.App. C. The Opinion of the Trial Court is not reported but may be found at Pet.App. D (entitled "Notice of Intended Decision"). The Judgment appears at Pet.App. E; the Declaratory Judgment appears at Pet.App. F; the Trial Court's Permanent Injunction appears at Pet.App. G.

JURISDICTION

The Opinion of the California Court of Appeal (First Appellate District, Division Four), was filed on July 27, 1979. That Court's Order denying your Petitioners' Petition for a Rehearing, and an accompanying modification of the initial Opinion, was filed on August 23, 1979. A Petition for Hearing by the California Supreme Court was timely filed on September 5, 1979, and was denied by the Supreme Court on November 8, 1979. On February 5, 1980, the Petition for Writ of Certiorari to the Court of Appeal was filed with the Clerk of this Court. The Petition was granted on July 2, 1980. Jurisdiction lies under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are: U.S.Const.Amend XIV; 42 U.S.C. §§ 1981, 1983, and 2000(e), *et seq.*; Calif.Const. Article I, §§ 7 and 8; Calif. Labor Code §§ 1410, *et seq.*, and Calif.Gov.Code § 50084, all of which are set forth *seriatim* in Pet.App.H.

STATEMENT OF THE CASE

INTRODUCTION

This Case raises important issues concerning the circumstances and manner under which a public employer may voluntarily grant preferences in employment opportunities based upon race and sex. Answers to serious constitutional questions are urgently needed for the guidance of public employees, as well as states and other public employers, subject to the mandates of the Fourteenth Amendment to the Constitution, Title VII (42 U.S.C. 2000e), and 42 U.S.C. 1981 and 1983.

Even if this Court decides that, under certain circumstances, compeling state interests for the granting of racial or sex-based preference may exist under the Fourteenth Amendment, here your Petitioners must prevail because the "compelling interests" advanced by the Respondents

(and, more importantly, the conduct engaged in by the Respondents) cannot survive the "strict scrutiny" of such classifications required under the Fourteenth Amendment.

The Trial Court found no evidence that hiring and promotion based upon race (to accomplish the goal of "mirroring" the inmate population) was necessary to maintain the safe and efficient operation of State prisons. Having failed to carry their burden, the Respondents, *after* trial, *after* the California Supreme Court had issued its decision in *Bakke,* 18 C.3d 34 (1976), and *after* the substitution of new counsel, attempted to reopen the case to establish that the real reason for the adoption of their Affirmative Action Plan (and consequent racial and sex-based preferences) was to remedy past discrimination. Respondents belatedly so contended despite the fact that they had already filed a binding answer to interrogatories denying that they had ever previously engaged in any prior discrimination. [*infra* at p. 15] There was no demonstrable relationship, nor any conceivable nexus, between any prior discrimination (intentional or otherwise) and the plan which was subsequently adopted to reflect the racial mix of the inmate population. In fact, the Respondents adopted a different benchmark for the hiring and promotion of women, simply because the percentage of women inmates in California State Prisons was too low to require any increase in the percentage of women in the Department's work force.

Acknowledging the lack of any nexus between the Department's plan as drafted and implemented and any alleged past discrimination, (and the belated nature of the contention), the Court of Appeal struck from Respondents' Brief any reference to such evidence not introduced at trial: see, *infra,* p. 14; see also the Court of Appeal Opinion, at Pet.App.A-22 and A-23; Finding of Fact, No. 13, by the Trial Court, Pet.App.F-5.

Notwithstanding the requirements of the "substantial evidence" rule, the Court of Appeal overturned, *sub rosa,*

some of the crucial Trial Court's Findings of Fact with regard to "compelling state interests"—i.e., safety and efficiency in the prisons. Citing no evidence supporting the theories advanced by the Respondents, and without negating or rejecting the overwhelming evidence supporting Petitioners' and Trial Court's position that "mirroring" the inmate population racially with the work force was not necessary to maximize safety or efficiency in the prisons, the Court of Appeal misconstrued one Finding of Fact of the Trial Court to overturn another Finding of Fact and reject the Trial Court's Conclusions of Law. By so doing, the Court of Appeal breathed life back into, and indeed resurrected, a dubious sociological theory that the Trial Court had rejected based on the oral, documentary, and expert testimony before it.

STATEMENT OF FACTS

In 1974, the California Department of Corrections voluntarily adopted and implemented an "Affirmative Action Plan" ("AAP" herein).[1] The stated principal objective of the AAP was to increase the number of "minority" employees in the Department to a level equalling at least seventy percent (70%) of any given "minority" in the inmate population of the Department (i.e., state prisoners) and to increase the number of female employees to a percentage equivalent to that in the total California labor force on April, 1970 (Pet.App. A pp. 5-6). Goals were set for specified minority groups, including "Black", "Asian", "Spanish surname", "Native American", and "other extraction." An "overall" employment goal of thirty-six percent (36%) minorities and thirty-eight percent (38%) women was established. The ostensible purpose of the AAP was to improve relationships with prisoners and to reduce racial

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[1]The 1974 AAP is Trial Exhibit ("Ex." herein) G. The AAP was revised in 1975 and was in effect during the trial of this case (Ex. R.) As far as Petitioners are aware, for purposes of this litigation Ex. R is the operable document.

conflict and violence in the prison system (Pet.App. A, p. 5). The objectives of the AAP included all areas of employment, including hiring, promotion, transfer, training, and work assignments (Pet.App. A, p. 6).

Although the AAP purported to establish "goals," and did not refer to "quotas", the evidence presented at Trial (described *infra*) revealed both policy and conduct by the Respondents to set aside positions and to grant preferences to attain the objectives of the AAP.[2] Some positions were officially reserved for minorities or women only and others were informally set aside. Minorities and women were granted such a competitive advantage over other applicants that their race or sex became the "but for" cause of their hire or promotion. The cumulative evidence compelled the Trial Court to find that under the AAP the respondents had engaged in a pattern and practice of granting preferences on the basis of sex and ethnic origin, not on the qualifications of individuals. The Trial Court's Finding of Fact No. 8 states as follows:

> "Defendants, Department of Corrections, and J. J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department. In so doing, the defendants were motivated at least in part by an affirmative action plan, adopted effective July 1, 1974. A copy of that plan is defendants' Exhibit "G" in evidence. The affirmative action plan was revised effective April 1, 1975. A copy of the revised affirmative action plan is Exhibit "R" in evidence. In so doing, preferences result in favor of certain ethnic groups, or in favor of one sex to the detriment of the other, and not solely on the qualifications of the individuals involved, or their merits." (Pet.App. F p. 4)

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[2]In its "Statement of Policy", the AAP mandated that "all employees of the Department of Corrections are expected to commit themselves to the accomplishment of the goals of the affirmative action program." (Ex. R.).

A. Positions Were Set Aside for Minorities or Women Only.

Some job announcements specified that positions were available for minorities or women only. The titles of various positions were advertised as "Correctional Sergeant—Minority" (Ex. 11); "Correctional Counselor I—Female" (Ex. R; R.T. 98-99); "Records Officer I—Minority" and "Correctional Lieutenant—Minority" (Ex. 13).

Often the reservation of positions for minorities and women was done less overtly. Promotional, hiring, and transfer policies, which appeared neutral on their face, in practice restricted the possibility of appointment to specified ethnic groups or women. Transfers became an important aspect of the AAP, since "parity" was to be achieved both in the "overall" Department work force and in each particular institution (R.T. 309: 10-19; R.T. 376: 18-20). The record is replete with evidence illustrating the application of the Department's policies.

The Superintendent of one facility rejected a transfer request from a Caucasian officer, stating:

> "We are not accepting any transfers from other institutions unless the requestor is a minority member." (Ex. 10, p. 4).

To a grievance filed by CCOA as a result of such denial, Respondent Enimoto replied as follows:

> "In view of our affirmative action policy I believe Superintendent McCarthy acted well within my expectations in determining what his affirmative actions program needs are and for establishing methods for obtaining the goal. If affirmative action is to be meaningful then we must be decisive on our determination to meet our goals. This often means that some people will now have to wait a little longer than they did in the past." [Letter from Director Enomoto dated November 3, 1975, contained in Ex. 10]

In 1975, Marvin Music applied for the promotional position of Acting Correctional Program Supervisor III.

He talked to Program Administrators Maddox and Vasquez concerning the position in the Susanville Facility (R.T. 134). Mr. Music had difficulty in even obtaining the standard interview. During the interview, Mr. Vasquez informed him that he "was going to appoint one of his fellow Chicano officers to the position," stating that he was going to give the minority a chance to "see what it was like, a chance to see what it was like at the top." (R.T. 134-135). One Oscar Pina, a minority, got the vacancy (R.T. 135).

When Tommy Simpson applied for promotion to Correctional Sergeant at the Tehachapi Facility, he was informed by the Program Administrator that he "wouldn't be considered" since the Administrator wanted to hire minorities, preferably "like himself" (whereupon he held out his arm and pointed to it: the Administrator was black). [R.T. 150: 22-24; 150-151]. Enomoto, then the Superintendent of that facility, denied Simpson's grievance concerning the appointment, stating:

> ". . . he was sorry but that the affirmative action was something that we all had to deal with, and several of us would have to pay the price for it, and that I was one of them." (R.T. 151-152).

The Records Officer in charge of hiring clerical workers at Chino was instructed not even to consider caucasian candidates (R.T. 710). To obtain minority employees for certain positions, the requirements were down-graded if applicants from the "targeted class" (i.e., minorities) were not available (R.T. 715). The Records Officer further testified that, in 1976, there had been a "big push" from his superiors to hire Mexican-American employees (R.T. 720). He wrote a memo protesting the Department's policy, stating as follows:

> "My instructions under the affirmative action program, are, until notified otherwise, I am not to consider any

> caucasian applicants . . . Knowing that the institution policy is to hire only minorities until a selective quota is met, I told Mike Wilson, Personnel Officer, that going through the facade of interviewing candidates was untruthful and misleading on my part and unless a minority candidate was unavailable, why interview white candidates?" (Ex. M)[3].

As a result of the Records Officers' testimony at trial, the Associate Superintendent sent a scathing two page memo to his immediate supervisor which, when brought to its attention, led the Trial Court to issue a Protective Order preventing retaliation against that officer, or any other employee, for testifying or offering evidence in the case (R.T. 816-819; C.T. 274-277). Neither in that memo, nor in the meeting attended by the Associate Superintendent, as well as the Superintendent, was the accuracy of the Records Officer's memo questioned (R.T. 724-725).

In 1976, Director Enomoto implemented a reorganization related to affirmative action. He sent out a memo concerning the recruitment of an assistant to the Deputy Director, stating as follows:

> "I made a decision *that the first priority was the recruitment of a Mexican-American male* to function basically as the Assistant to Dorothy. Interviews, with input from the CCWA [Chicano Correctional Workers Association] on possible candidates, have been held, a decision will be made soon. No *other* positions have been finalized." (Emphasis added; Ex. 38)

The record contains numerous examples of the setting aside of positions for women. In 1975 a notice announcing the position of Field Representative at the Board of Corrections stated:

> *"In keeping with the Department's affirmative action program, applications will be accepted from women*

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[3]The Records Officer did not talk to anyone about writing the memo and was not told by anyone to write it. He was not then, nor had he even been, a member of Petitioner CCOA (R.T. 729).

> *only from the rank of Sergeant II and including Program Supervisor.*" (Emphasis in original); Ex. 6 p. 6)

When a grievance was filed as a result of the announcement, the original notice was withdrawn, and a letter was sent by the Executive Officer of the Board of Corrections to CCOA (with a carbon copy to the Assistant Director of the Department) stating:

> "While I acknowledge the validity of your complaint (both personally and on behalf of CCOA), you *force me as an Administrator to be dishonest as I intend to try to find a qualified female to fill the slot.*" (Emphasis added; Ex. 6)

The Department frequently requested "female only" certification from the State Personnel Board. Although the Board is authorized to issue such certifications only when the objective requirements of a particular job absolutely necessitate that employees of only one sex fill the position, the Department used this process to set aside positions for women. In a letter from the Assistant Personnel Officer to the SPB requesting a "female only certification" for Correctional Sergeant, the justification was based in terms of the need to "balance" the work force by sex. (Ex. 25)

B. Minorities and Women were Given a Competitive Advantage in Employment Opportunities because of their Race or Sex.

Where positions were not specifically *reserved* for minorities or women, the Department granted preferences so that lesser-qualified minorities and women received appointments over more qualified (and, in some cases, significantly more qualified) caucasians or males. The relative qualifications of candidates were based not only on objective standards, including written tests, but on other, more subjective criteria, including the perceived ability to establish rapport, job history, and education (R.T. 304-305; 689-691). Even when these factors produced clearly more qualified non-minority or male candidates on eligible lists, the

race or sex of candidates quickly became the "but for" cause of hiring or promotion. E.g., R.T. 307:3-11; R.T. 304-307; R.T. 689-691.

Enomoto was one of a number of officials who acknowledged that if the "goals" had not been achieved, minorities and women who were "reasonably qualified" would get jobs over others who might be considerably more qualified. In August of 1975, the Director denied a grievance stating:

> "In addition it appears that Supt. Morris has also adhered to a statement I often make to highlight my beliefs that with reasonably equal qualifications, when one is a minority and one is a non-minority, then the job is given to the minority (Ex. 16)."

At Trial, the Director admitted that his statement was an accurate description of how the AAP worked (R.T. 289).

In testimony given at deposition and read at trial, the Chief Deputy Director pointed out that if "parity" had been reached in a particular classification, then the "most qualified" person would get the job, regardless of race. However, if "parity" had not been reached, then the job would go to a lesser qualified minority (R.T. 690-691). The Assistant Director of Women's Affairs (who became the official in charge of affirmative action) testified that if "parity" had not been reached, positions would be given to minorities and women, rather than substantially more qualified caucasians or men.[4] Ms. Stevens-Roby established goals, directives, and procedures of the AAP, and she presented state-wide seminars and work-shops thereon (R.T. 175), and no one in the Department had greater responsibility to oversee AAP operation as to women than her. (R.T. 176-177).

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[4]During the deposition, in response to questions asked by her own attorney, Deputy Attorney General Lieberman, Ms. Stevens-Roby testified as follows: "Q. [by Deputy Attorney General]: he also asked you a hypothetical question *where no parity had existed*

The drastic degree to which preferences were afforded is best seen from a statement by Director Enomoto made shortly after his appointment: he announced that white males would have to wait *at least five years* to get a promotion in his Department (R.T. 25-26; 46-47; 284-285).

C. Purported Justification for the Use of Racial and Sex-Based Preferences.

At Trial, Respondents justified their use of race and sex in hiring and promotions as necessary to serve the "compelling state interest" of minimizing racial tensions in the prisons, thereby furthering orderly and efficient prison management. While recognizing that such an interest might justify consideration of race and sex in making *job assign-*

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with respect to the composition of that classification and asked you to assume that there was a minority candidate and a non-minority, and the minority [sic] was more qualified than the non-minority [sic] candidate.

You testified, as I recall, that the minority candidate should be given the appointment *even though* the non-minority candidate might be a *little bit* more qualified. Do you recall that? A. Uh-huh (affirmative). Q. In that same hypothetical *if the non-minority* were *substantially more qualified than the minority*, what would be your opinion? A. *And parity had not been reached?* Q. That's correct. A. My opinion would be that the minorities should have the job. (Emphasis added; R.T. 111-112).

Further: Q. [By Mr. Lieberman]: Let me give you one more hypothetical. We have a situation where there is no parity and we have a male applying for the position and a female applying for the position, and by past practice, both males and females have been appointed to this position. A. Uh-huh (affirmative). Q. The male is *substantially more qualified than the female.* Now under departmental policy, which person should be recommended for this position? A. If parity has not been reached, *the female.* Q. Even though she is substantially the less qualified than the male? A. As long as she has qualified for the position, if parity has not been reached." [Emphasis added; R.T. 113].

Ms. Stevens-Roby testified that the transcripts submitted to her were an "accurate reflection of what she said that day" and that she understood the questions submitted to her by Mr. Lieberman (R.T. 184-185).

ments and delegating *responsibilities*,[5] the Trial Court found no evidence to support the necessity for the use of race and sex in basic *hiring* and *promotion* decisions.[6] Thus, the Judgment and Permanent Injunction do *not* prevent the Department, for example, from assigning an employee of one race to infiltrate a prison gang comprised solely of members of that race; nor does the Injunction preclude the assignment of an employee of a particular race to speak to members of a gang who request a spokesperson of such race in a riot or other emergency. Indeed, Petitioners never sought any order precluding the Department from dealing with such extraordinary situations. Respondents submitted absolutely no evidence suggesting that there are insufficient employees of any and all racial categories, at each and every prison facility, to allow the Department this flexibility in such emergencies.

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[5]The Trial Court's Finding of Fact No. 19 states as follows:

> "The unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system require the Department to exercise broad discretion in making job assignments and in determining the employment responsibility of its employees. Because of the conditions and circumstances within California prisons and throughout the Department of Corrections, in making job assignments and in determining employment responsibilities it is necessary for the Department to consider, among other factors, the composition of the existing work force and of the inmate population, and of the race and sex of employees, in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." (Pet. App. F, pp. 6-7).

[6]The Trial Court's Finding of Fact No. 8 states in pertinent part as follows:

> "Defendants Department of Corrections and Jero J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department . . ." (Pet. App. F, p. 4).

The record furnishes no support for the contention that a particular racial or sexual composition of the correctional work force reduces racial conflict and violence. Substantial evidence supports the conclusion of the Trial Court that while race or sex might be considered with regard to job assignments, they cannot constitutionally be the "but for" cause of lesser-qualified persons receiving jobs or promotions over more qualified applicants.

During Trial, Respondents never advanced the suggestion that amelioration of any past discrimination was the compelling state interest justifying the use of its preferential employment practices. Instead, Respondents claimed that the use of race in hiring practices was necessary to solve the problem of violence in the prisons.[7]

Abundant substantial evidence support the Trial Court's finding that hiring and promotion on the basis of race was not necessary to serve any asserted State interest. In regards to the ability to establish rapport with inmates, for example, the Respondents' own witnesses testified that several factors other than race could be more

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[7]At trial, Deputy Attorney General Gordon Zane stated as follows:

"Our defenses are on two levels, Your Honor.

First of all, we're contending in this case that the Department only hires the most qualified people, and that's their policy. There may be exceptions down below, but that's their policy.

On the other hand, if the Court so should find that they're using race as a factor in the hiring process as a qualification process, then we have the burden of showing that they must demonstrate real reason for doing this. And that's what we've been trying to do with these witnesses, showing that they have a real problem . . . I have a compelling state interest if the Court should find that race is being used as a factor. To do that, I have to show that they have a real problem that they are trying to solve, the violence in the prisons, the operation of the prisons.

And the next step is to show that they're each trying to solve it by hiring minorities in the ratios they're trying to hire." (R.T. 660-661).

important.[8] Having failed to prove at trial any relationship between minority levels of employment and the reduction of racial violence, Respondents attempted to present their evidence to the Court of Appeal for the first time, in the form of citations to newspaper articles, books and treatises. The Court of Appeal granted Petitioners' Motion to Strike this evidence, as follows:

> "The motion to strike portions of Appellants' Opening Brief is granted. Those portions of said brief making reference to newspaper articles, books or treatises, which in no way were part of the record in the Trial Court and additionally were not cited or relied upon by any of the experts called by the parties; and any and all mention of documents submitted in the motion to argument record filed in the Trial Court, is ordered stricken. The designation of all such newspaper articles, books and treatises is attached hereto and made a part

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[8]Respondents' witness Dr. Lopez-Lee, a psychologist, testified that although black correctional officers could often best relate to black prisoners, and Hispanic correctional officers to Hispanic prisoners, other factors (including economic background, educational level and degree of sympathy) could overshadow race as a factor. Thus, he acknowledged that a black Harvard professor would be more likely to "relate" to a group of white law students than would a white manual laborer. (R.T. 854-856).

Respondents' witness Federal Warden Bill Garrison testified that when trouble arose among prisoners, he did not automatically turn to a guard of the same race as the prisoners, but would make assignments on the ability of guards to deal with a particular group concerning a particular problem (R.T. 584).

The Director of the Department himself testified that the ability of officers to relate to inmates on the basis of race varied from individual to individual (R.T. 314). On the other hand, petitioners' witness Dr. Thomas Szasz, a well-known psychiatrist, testified that his research revealed no scholarly literature indicating that officers of the same race as prisoners could, or could not, communicate better with these prisoners; to the contrary, the literature indicated that prisoners respect certain characteristics in officers (e.g., fairness) and that one study indicated that only five to ten percent of inmates attributed their feelings about correctional officers to their race (R.T. 754).

of this order." [See order of January 10, 1979, a part of record forwarded from Clerk of Court of Appeal.]

Lastly, the Trial Court specifically found that the AAP had *not* been adopted to remedy any past discrimination. Although the Trial Court acknowledged long-standing discrimination against minorities and women by American society, it found that the preferential employment practices of Respondents were not justified by, *nor did they remedy,* such past wrongs. (Finding of Fact No. 13, Pet. App. F. p. 5).

Despite their binding pre-trial disclaimer of any past discrimination,[9] after trial, and after retaining new counsel, Respondents moved to augment the record to introduce evidence of past discrimination in the form of certain Declarations. The Court of Appeal upheld the Trial Court's denial of the Motion, deeming such evidence "irrelevant" (for the reasons stated in Finding of Fact, No. 13 above), adding that the Motion was "made by after-thought and much too late". (Pet.App. A. p. 23).

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[9]In response to an interrogatory, the Respondents denied any prior discrimination. They did advance an assertion of "adverse impact", which the Court of Appeal noted as the *only* substantial evidence in the record of past discrimination (Pet.App. A. p. 9). The Interrogatory, and Answer, were as follows:

"INTERROGATORY 1. Do you contend for the purposes of this litigation that the Department of Corrections of the State of California, or any of its agents, employees, representatives, officers, officials or other authorized representatives, illegally or improperly discriminated against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment on the basis of that person's race, color, creed, sex or national origin?

ANSWER: For the purpose of this litigation, the Department of Corrections of the State of California does not allege that it has wilfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment on the basis of a person's

In regards to sex-based preference, Respondents advanced no important governmental interest other than that proposed by the very terms of the AAP, i.e., the maintenance of "balance" in the work force. Testimony at trial was scant. Two of Respondents' witnesses were asked if they thought that women brought any "special attributes" or "an extra dimension or quality" to the job (R.T. 444; 485). One responded that "the dining rooms were much more orderly and well-behaved", but could add no other specifics (R.T. 485-486). The other responded that they "make a very abnormal environment a little more normal", but was hard pressed to add any specifics (R.T. 444-445). Finally, on a rather bizarre note, an "expert" witness claimed that female correctional officers were better able to rehabilitate sex offenders and rapists. R.T. 614-615.

Thus, this case presents a situation where a public entity has completely reserved entry-level and promotional positions for minorities and/or women and has granted preferences to such minorities or women in appointments to positions over more qualified non-minorities or males. The Trial Court rejected Respondents' rationale to justify such racial and sexual categorization—that the racial composition of the work force should mirror that of the inmate population to promote safety in the prisons. The Trial Court's rejection of this highly dubious proposition was based on expert testimony and other evidence introduced by Petitioners. Thus, Respondents are left with no defense to their racial and sexual categorizations but that of the questionable social goal of achieving particular racial and sexual balance in a public work force.

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race, color, creed, sex and national origin. The Department does allege, however, that as a result of its past hiring and promotion practices and procedures, there has been an adverse discriminatory impact on certain minorities and the female sex, in the terms of initial hiring and also promotion." (C.T. pp. 121-122).

SUMMARY OF ARGUMENT

In an attempt to increase the percentage of minorities and women in its work force, the Department of Corrections adopted an "Affirmative Action Program". The announced objective of the program was a racially and sexually-balanced work force, the ethnic composition of which would "mirror" the inmate population by reflecting a balance of at least seventy percent (70%) of the various racial and ethnic groups in the inmate population. The sexual make-up of the work force would reflect the percentage of women in the California work force generally. The ostensible purpose of this program of preferences was the safe and efficient operation of correctional facilities by the amelioration of racial conflict and violence within the walls of the prisons. The AAP itself made no reference, direct or oblique, to the purpose of remedying past acts of discrimination by the Department against women or minorities.

Under the aegis of its AAP, the Department granted absolute preference to minority and female candidates for certain entry level and promotional positions by completely setting-aside certain positions for female and minority candidates, so that non-minorities or men could not even compete. Other positions, although not concretely set aside, were awarded to candidates because of their race, ethnic background, or sex in a more covert manner, so that less-qualified minorities or women received appointments over more-qualified caucasians or males.

The imposition of burdens, and the granting of extraordinary benefits, to citizens on the basis of their race or sex by the State violates the provisions of the Fourteenth Amendment guaranteeing to all persons "equal protection of the laws". The creation of artificial classifications by a State on the basis of race imposes upon the Courts the duty to engage in "strict scrutiny" of such governmentally created racial classification, to determine whether there is a sufficiently compelling State interest to justify the use of such preferential classifications. If a State carries

the heavy burden of establishing such State interests, the State must then establish that the classification is necessary for, and narrowly drawn and tailored to, the achievement of the compelling State interest, and that there exist no other, less drastic, or alternative means available to the State to achieve its ends. The legislative history surrounding the Fourteenth Amendment (particularly the Congressional debates) clearly establishes that the Amendment protects non-minorities and males, even where a State categorizes its citizens by race or sex for "benign" purposes. The prohibitions of Title VII, of course, preclude employment discrimination against *all persons* on the basis of their race or sex.

At trial, the Court subjected the State's racial and gender-based classifications to "strict scrutiny" and found them completely lacking. While agreeing that the amelioration of racial conflict and violence within the prisons was a significant State interest justifying the limited use of race or gender in making assignments and transfers, the Trial Court found that the State had advanced no compelling State interest justifying the use of such preferences in decisions to hire or promote. Far less drastic and intrusive means to reach the same end (such as intensive recruiting, training, etc.) were available without imposing any drastic diminution on the reasonable expectations of non-minority and male employees.

The AAP itself did not recite that an underlying purpose was to remedy past discrimination. At trial, Respondents' eschewed any such justification for the program. After trial, and after the Court had rendered its preliminary ruling and decision, Respondents retained new counsel and moved to reopen the record to advance, for the first time, the theory that a purpose of the program was to ameliorate the effects of past discrimination. The Trial Court rejected this attempt as untimely and irrelevant. Respondents showing was predicated entirely upon "adverse impact". Mere "adverse impact" is not a sufficiently compelling State interest for

the granting of racial or sex-based preference in public employment.

Notwithstanding this abundance of substantial evidence, the Court of Appeal reversed by declaring that the Trial Court's approval of the use of sex or race in making *assignments* and *transfers*, under unique situations, constituted an oblique "finding" of a compelling interest sufficient to allow the use of racial or sex-based preference in hiring and promotion. Ignoring the "substantial evidence rule", the Court of Appeal did not bother to negate or reject the other findings of the Trial Court, or to discredit the abundant testimony undercutting the rationale advanced at trial by the Respondents. Instead, the Court of Appeal assumed that an affirmative action plan could be adopted by a public agency to remedy its past acts of discrimination, even though both the Trial and Appellate Courts had refused to augment the record to allow the Respondents to make an untimely and belated showing of claimed past employment sins. The slender straw upon which the Court of Appeal based its decision was its belief that the record indicated "some evidence" of a State interest in maintaining safe and non-violent prisons (an assertion never contested by Petitioners), and leaped from this conclusion to the totally unsupported premise that employment decisions based upon race and sex were necessary to effectuate this end.

Assuming the establishment of a compelling State interest, the AAP was neither narrowly drawn nor of limited duration. As drafted and implemented, the Program totally excluded caucasians and males from any competition in certain entry level and promotional positions, and where concrete "set asides" of positions were not made, the Program was so implemented by the Department and staff that, as a matter of policy, lesser-qualified minorities or women were hired or promoted over more-qualified non-minority persons. Since the AAP was predicated upon

"mirroring" the inmate population, the Plan was of unlimited duration, as the inmate population constantly varies. The Plan continued indefinitely, was without a termination date, and was totally inflexible, providing no appeal rights for non-minorities who had been adversely affected by it. It benefits persons who have never been the victims of any discrimination.

Unlike prior plans approved by this Court, the AAP was not the fruit of arm's-length collective bargaining between a recognized employee organization and employer, both arguably guilty of prior employment discrimination against protected minorities. Indeed, the Plan was steadfastly opposed by Petitioner CCOA and had been unilaterally imposed by the employer, with drastic impact upon innocent co-workers who naturally perceived the Plan as illegitimate and ill advised.

In regards to their sex-based preferences, Respondents advanced only two defenses, namely that the presence of females in the correctional setting made an abnormal social situation slightly more normal and that the dining rooms appeared to be neater and cleaner. In passing, one Respondent witness suggested that female correctional officers were better able to rehabilitate rapists and other sex offenders. Under long-established California law, sex is a "suspect classification" subject to the "strict scrutiny" test, and the Trial Court understandably rejected these defenses as utterly deficient to establish a compelling State interest. Absent even "strict scrutiny", the rationale for the sex-based preferences is utterly lacking, based on sexual stereotypes, and totally conjectural.

Indeed, a proper affirmative action program, of limited duration, where race and sex become factors if the employer and union in question have been arguably guilty of prior employment discrimination, may be constitutionally permissible. Traditional principles of equity must be considered and the legitimate expectations of co-workers and co-applicants for employment, of all races and both sexes, must

be taken into account. The AAP in question was of indefinite duration, often inflexible, granted absolute preference by creating absolute exclusions or operated to hire or appoint persons less qualified than their competitors, and was neither drafted, implemented, or administered for the purpose of remedying any past acts of employment discrimination, intentional or otherwise. Instead, the AAP was adopted to advance the vaguely defined and ill-conceived sociological goal, often rejected by this Court in the past, of assigning employment opportunities and job tasks to citizens on the basis of their race or sex based upon the assumption that they can better serve persons of "their own" race or sex than can other members of our diverse society. Such an AAP is without legal precedent, support, or reason, either in common sense or in law, and was properly struck down by the Trial Court.

ARGUMENT

I.

ANY USE OF RACIAL CLASSIFICATION MUST BE SUBJECT TO STRICT SCRUTINY, MUST BE JUSTIFIED BY A COMPELLING STATE INTEREST, AND MUST BE NARROWLY DRAWN TO ACHIEVE THAT INTEREST.

This Court has long held that racial classifications used to the disadvantage, or benefit, of any individuals or groups because of their race or ethnicity must be subjected to strict scrutiny, must be justified by a compelling state interest, and must be narrowly drawn to achieve that interest. *Loving v. Virginia,* 388 U.S. 1 (1967); *McLaughlin v. State of Florida,* 379 U.S. 184 (1964); *In re Griffiths,* 413 U.S. 717 (1973). The "strict scrutiny" test utilized by this Court, finds compelling support in the legislative history of the Fourteenth Amendment.

A. The Legislative History of the Fourteenth Amendment Indicates that the Amendment Was Meant to Protect All Groups and Not Simply Racial Minorities.

Whatever might be said about the somewhat inconclusive legislative history of Title VII of the Civil Rights Act of 1964 (discussed in both the majority and dissenting opinions in *United Steelworkers of America, AFL-CIO v. Weber*, et al., ... U.S. ....., 99 S.Ct. 272, 61 L.Ed. 480 (1979) it is abundantly clear that the framers of the Fourteenth Amendment to the United States Constitution never intended that states could ever favor minorities (and specifically black citizens) to the disadvantage of white citizens consistent with the Constitution. Indeed, the supporters of the Fourteenth Amendment only intended that minorities be treated equally with whites: See R. Berger, "Government by Judiciary," (1977), 166-192.

The Amendment's supporters desired that all races be treated *alike*; no race could be singled out above any other. As Congressman Schellabarger of Ohio stated, during session in 1866,

> ". . . whatever rights as to each of these enumerated civil . . . matters the State may confer upon one race or color of the citizens shall be held *by all races in equality* . . . It secures . . . equality of protection in those enumerated civil rights which the States may deem proper to confer upon *any* races . . ." Cong. Globe, 39th Cong., 1st Sess. 1866, 1293. (Emphasis added)

Congressman Stevens of Pennsylvania explained:

> "Whatever law protects the white man shall afford equal protection to the black man. Whatever means of redress is afforded to one *shall be afforded to all.* Whatever law allows the white man to testify in court shall allow the man of color to do the same." Cong. Globe, *Ibid.*, 2459. (Emphasis added.)

Emphasizing that the Amendment was applicable to all races, Congressman Niblack explained that:

> ". . . laws must be made equal; they must be administered equally *upon all classes* without regard to color or race." *Ibid.*, 1056 (Emphasis added).

As final examples of the intent and purpose of the Fourteenth Amendment to insure equality, and to prohibit the favoring of any race over any other, we need only examine the statements of Senator Howard and Representative James Wilson of Iowa. Thus, Senator Howard stated as follows:

> "This [the Amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . Ought not the time to be now passed when *one measure of justice* is to be meted out to a member of one caste *while another and a different* measure of justice is to be meted out to the member of another caste, *both castes being alike citizens of the United States*, both bound to obey the same laws, to sustain the burdens of the same government, and both equally responsible to justice and to God for the deeds done in the body?" *Ibid.*, 2766 (Emphasis added).

Congressman Wilson stated:

> "*One race shall not be favored* in this respect more than another . . . This is the spirit and scope of the bill, and it does not go one step beyond." Ibid., p. 1117. (Emphasis added).

B. This Court has Consistently Found Fourteenth Amendment Protections Equally Applicable to all Groups.

In an early case, this Court emphasized the Fourteenth Amendment's applicability to all races. In *Strauder v. West Virginia,* 100 U.S. 303 (1880), a West Virginia law excluding blacks from juries was struck as violative of the Fourteenth Amendemnt. In doing so, this Court explained:

> "That the West Virginia statute respecting juries is such a discrimination ought not to be doubted . . . nor

> would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population, a law should be enacted excluding all white men from jury service, thus denying them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws." 100 U.S. 303, at 307.

Similarly, in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) this Court stated:

> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." 118 U.S. 356, at 369.

See also, *Hernandez v. Texas,* 347 U.S. 475 (1954).

These cases reflect this Court's recognition of the heterogeneous nature of our society. Such judicial recognition explicitly appears in an early disproportionate racial impact case, *Akins v. Texas,* 325 U.S. 398 (1945). Blacks were eligible to be members of the grand jury, but only one black was chosen, less than the proportion of blacks in the community. This Court rejected the argument that disproportionate impact was sufficient to constitute a Fourteenth Amendment violation, stating:

> "The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection." 325 U.S. 398, at 403.

Similar recognition of the heterogeneous nature of our society is seen in more recent cases, such as *Jefferson v. Hackney,* 406 U.S. 535 (1972), where the Court noted that:

> ". . . given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others." *Ibid.,* at p. 548.

In *James v. Valtierra,* 402 U.S. 137 (1971), a referendum requirement in California was challenged as having a disproportionate racial impact. Referendum was required to establish low-income housing but not other issues. This was claimed to violate the Fourteenth Amendment, since low-income housing affected blacks and other minorities far more than whites. This Court rejected the argument, again referring to the heterogeneity of the American people:

> "But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." 402 U.S. 137, at 142.

See also the apportionment cases of *Wright v. Rockefeller,* 376 U.S. 52 (1964) and *City of Mobile v. Bolden,* ..... U.S. ....., 100 S.Ct. 1490 (1980).

The theory was well-stated by Justice Powell in *Bakke,* where he noted that the very concept of "majority" and "minority" groups reflects temporary arrangements and political judgments. The white majority "itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals." *Bakke,* 438 U.S. 265, at 295. "Preferences" would require our courts continually to decide how severely different groups had been disadvantaged. As Justice Powell concluded:

> "The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable." *Bakke,* at 297.

The implementation of "benign" racial classifications can be a two-edged, or multi-edged, sword. Thus, a classification system, like that of the Department of Corrections, can be used against some of the very "minority" groups it was originally designed to help. Indeed, the record shows how the racial classification system implemented by the Department could be used *against* a minority group it was supposed to aid. See, for example, the statements of Mr. Senon Palacioz (then the Deputy Director of Human Relations for the Department), in executing part of the "Third Quarter Review" (1975-1976) for affirmative action in the Department (in Defendants' Exhibit K, at approximately the 26th page of that Exhibit: "Quarterly Management Review," dealing with Region II, dated May 3, 1976, in Exhibit K). Mr. Palacioz stated, under "New Problems", as follows:

> "(1) 100% of T and D assignments (7) *were to Black staff. Need to make a better distribution.*
>
> (2) Mexican-Americans did not share in 'acting' opportunities." [Emphasis added] Exhibit K, p. 26.

Further, in discussing "unsolved problems from last quarter," Mr. Palacioz listed such problems as follows:

> "(1) Mexican-Americans hold only three (3) of seventy-five supervisory positions.
>
> (2) Mexican-Americans comprise only 9% of the total staff."

This emphasis by a member of one minority group, concerning promotional opportunities for persons from his ethnic background to the seeming detriment of members of another minority group, emphasis the multi-edged nature of the "sword" of racial preferences. Within a prison system already plagued by racial gangs, the continued categorization of employees by race only reinforces the existence of racial gangs and racial violence: Testimony of Warden William Garrison, R.T. 585-586. In the unique situation of the prisons, the categorization by race and sex only exac-

erbates, rather than ameliorates, attitudes of prejudice and distrust.

II.

THE RESPONDENTS UTTERLY FAILED TO ADVANCE AND PROVE AT TRIAL A COMPELLING STATE INTEREST FOR THE USE OF RACIAL CLASSIFICATIONS AND PREFERENCES

Neither Respondents nor the Court of Appeal subjected the system of racial preference utilized by the Respondents to strict scrutiny. The Trial record does not support the Department's contention that its policy of preference reduces racial violence in the prisons. Indeed, the Trial Court found that there was insufficient evidence to justify this purported interest or rationale. Even if such an interest existed, and there was an articulated rationale between the AAP and the interest, the State is still obligated to demonstrate that its actions were taken on the basis of findings or evidence that the use of race would serve such interests:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e.g., *Teamsters v. United States*, 431 U.S. 324, 367-376, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977); *United Jewish Organizations*, 430 U.S. at 155-156, 51 L.Ed.2d 229, 97 S.Ct. 996; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 15 L.Ed.2d 769, 86 S.Ct. 803 (1966). *After such findings have been made*, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, *the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined.*" *Bakke*, 438 U.S. 265, 307-308. (Emphasis added)

This is not a case like *Fullilove v. Klutznick* ..... U.S. ....., 100 S.Ct. 2758 (1980), where special deference is owed to Congressional intent or findings.

Since no special deference is owed to the actions of Respondents in their utilization of the suspect classification of race, and since the Trial Court found that such categorization was not in fact required to achieve a compelling state interest, it is appropriate to review in detail what these purported interests were. In so doing we are mindful of the standards announced by this Court where the "suspect classification" of race is utilized:

> "We have held that in 'order to justify the use of the suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is *"necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" University of California Regents v. Bakke,* 438 U.S. 265, 305 (1978) (Emphasis added)

A. The Respondents Failed to Prove that the Use of Race was Necessary for the Reduction of Violence in the State Prisons.

Petitioners have never disputed the interest of the State in reducing racial conflict and violence in its prison system. However, the record was devoid of evidence showing the *necessity* for *hiring* and *promotion* based upon race in order to serve this interest.

Evidence of any relationship between the race of correctional officers and the reduction of racial tension and violence in the prison was scanty at best, and vigorously contested by Petitioners (see Statement of Facts). The Trial Court did hold that race and sex of employees *could* be used in making "job assignments and in determining the employment responsibilities of its employees." (Finding of Fact No. 19, Pet.App. F p. 6; Conclusion of Law No. 4, Pet.App. F p. 8). However, the Trial Court further held that the use of race and sex in hiring and promotion decisions had not been justified by the Respondents (Findings of Fact No. 8, Pet.App. F, p. 4, Conclusions of Law, No. 2 Pet.App. p. 7).

The scrutiny employed by the Court of Appeal in overruling the Trial Court's finding consisted only of the following casual and conclusory remark:

> "The AAP indicated, and there was evidence, that the desired 'minority' level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." (Pet. App. A p. 5).

Since the AAP made no reference to desired minority levels serving the inmate related objectives of the Department, the Court of Appeal was compelled to modify its Opinion to delete the assertion that there was such evidence. (Pet.App. B p. 1).

The Court of Appeal extracted from the Trial Court's Finding of Fact No. 19 (a legitimate interest justifying the use of race and sex in job *assignments and responsibilities*) the conclusion that there was evidence that the use of race in *obtaining a desired* level of minority *employment* was necessary to serve the same objective. The Court of Appeal cited no evidence to support this assertion—there is no such evidence in the record. The premise that the use of race or sex is permissible in determining job assignments and responsibilities does not lead to the Court of Appeal's conclusion that a particular level of overall minority and female employment is necessary; there is already a sufficient number of minorities to fulfill the Department's "needs" with respect to assignments and responsibilities.

Any evidence even suggesting a nexus between reducing violence, establishing rapport, the efficient operation of California prisons and the race of correctional officers was scanty at best. More significantly, the record reflects more-than-substantial evidence to support the Trial Court's conclusion that the discrimination in question was not necessary to achieve any such purported interests. Under traditional standards of appellate review (including California), the Court of Appeal improperly substituted its

sociological view of the world for the factual conclusions reached by the trier of fact.

Although the Court of Appeal stated "that there was evidence" to draw a conclusion opposed to that of the Trial Court, the applicable California (and federal) rule is to determine whether there is any substantial evidence to support the Trial Court's finding:

> ". . . Where the findings are attacked for the insufficiency of the evidence, appellate review begins and ends with the determination as to whether there is *any* substantial evidence to support them; that [the reviewing courts] have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." *Overton v. Vita-Food Corp.*, 94 Cal.App.2d 367, 370 (1949).

Thus, reversal by the Court of Appeal if it were of the view that the evidence preponderated in favor of the appellant therein [*Alvaugh v. Mt. Shasta Power Corp.*, 9 Cal.2d 751 (1937)], would be inappropriate; indeed, in reviewing the evidence, the Court of Appeal was bound to accept all reasonable inferences that could be drawn from the evidence most favorable to the respondents in that Court. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427 (1935).

Even if the Trial Court had found that a desired minority level would serve the "inmate related objectives" of the Department, the use of racial classification would nonetheless be constitutionally impermissible. The use of such classifications to serve the "operational needs" of a public employer, or to satisfy community preference, has been repeatedly rejected: *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 491 (1972); *Monroe v. Board of Commissioners*, 391 U.S. 450, 459 (1968); *Washington v. Lee*, 263 Fed.Supp. 327 (M.D. Ala. 1966), aff'd per curiam, *Lee v. Washington*, 390 U.S. 330 (1968); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Education*,

349 U.S. 294, 300 (1954); *Baker v. City of St. Petersburg*, 400 F.2d 294 (5th Cir. 1968); *Smith v. Board of Education of Morrilton School District, No. 32*, 365 F.2d 770 (8th Cir. 1966).

In *Baker v. City of St. Petersburg, supra,* the police department assigned black patrolmen to black districts, alleging that this was necessary for effective police work. The Fifth Circuit held that the "department's practice of assigning Negroes solely on the basis of race to a Negro enclave offends the Equal Protection Clause of the fourteenth amendment." 400 F.2d 294, 300. In *Lee v. Washington, supra,* this Court rejected the segregation of inmates in various penal facilities, justified by the State as necessary for prison security and discipline. In this case there is evidence that minority correctional officers themselves resent being deemed "specialists" to deal with persons mainly of their race; they often feel they can establish rapport with, and guard, inmates of all races. (RT 585)

B. The Respondents Did Not Advance Prior Intentional Discrimination as a Compelling State Interest for the Racial Classifications in Question.

This Court has held that remedying established past discrimination may be a compelling state interest sufficient to justify the limited use of racial classifications by a public entity. Thus, the Court has found that orders for redistricting and busing are justified only by a finding of prior intentional discrimination. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Green v. County School Board,* 391 U.S. 430 (1968). The same standard was recently advanced in *City of Mobile v. Bolden, supra,* upholding at-large voting election procedures absent a showing of discriminatory intent; this is also the standard where employment discrimination is alleged. *Washington v. Davis,* 426 U.S. 229 (1976).

However, Respondents did not justify their use of racial preferences as a remedy for their prior discrimination. Not

only did they bind themselves with a disclaimer in an answer to an interrogatory (denying previous discrimination) but their case was tried on the basis that the Program was adopted to "serve inmate-related objectives of the Department." (Pet.App. A. p. 5).

After trial, Respondents attempted to gather and introduce evidence of past discrimination. The Court of Appeal upheld the Trial Court's finding that such evidence was "irrelevant" and "made by after-thought, and much too late". (Pet.App. A, p. 23). This ruling was based upon the Trial Court's Finding of Fact No. 13 to the effect that ". . . the acts complained of in the above-entitled action are not justified by, *nor do they remedy,* past wrongs by *society* against such minority or women." (Emphasis added) (Pet. App. F, p. 5).

Moreover, there is no sufficient logical nexus between past discrimination (even if proved) and the remedy of hiring and promoting to reflect percentages found *in the inmate population* to satisfy the standards set forth in any of the opinions set forth in *Fullilove, supra.* In a similar case, the California Court of Appeal had the following to say about attempts to justify minority preference with statistics gathered *after* the commencement of a court action:

> "Minority preference . . . must be remedial, i.e., directly responsive to a demonstrated precedent violation of statutory or constitutional rights. *Post hoc justifications, precipitated by litigation* are an inadequate substitute for the kind of administrative findings required to limit the burden on non-minorities to the confines of the compelling governmental need . . ." *Department of General Services v. Superior Court,* 85 Cal.App.3d 273, at 284 (1978) (Emphasis added).

C. "Adverse Impact" Is Not a Compelling State Interest for the Granting of Racial or Sexual Preferences.

The AAP was not adopted for the purpose of remedying any prior discrimination, intentional or otherwise. Nonetheless, Respondents now suggest that their previously neutral and employment practices did not result in a satisfactory percentage of minorities or women hired or promoted. Respondents equate this lack in percentages with "adverse impact."[10]

In fact, Respondents have no idea of the composition by race or sex of their applicant flow for entry-level positions; they have no idea whether or not they were hiring any particular racial group (or minorities in general), or women, at an even higher percentage than those in the applicant pool. (R.T. 281-282).

Regarding promotions, the statistics cited in the AAP itself (assuming proper tests used to show adverse impact under Title VII standards) demonstrated that there was no adverse impact with respect to minorities or women:

> "Based upon State Personnel Board statistics as of September 30, 1973, the ethnic background of Department of Corrections' personnel are about 80.2% Caucasian, 8.8% Black, 7.4% Spanish Surname, 1.2% Asian, .2% Native American, and 2.2% of other extraction . . . The breakdown of appointment statistics revealed that there were 356 promotions in the Department during the same six-month period. Caucasian personnel comprised 81.2% of those employees promoted while Spanish Surname and Black personnel were represented by 8.4% and 8.1% respectively . . .
>
> Department of Correction [female] personnel reflects a total of only 17.3% . . . the total percentage of promotions received in 1973 is 4.63%. Of this total, 3.61% were males and 1.02% were females." (Ex. R).

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[10]See Respondents' response to an interrogatory, quoted completely, Footnote 9, *supra*, p. 22.

Even if "adverse impact" had been advanced and proved as a compelling interest, the Fourteenth Amendment has consistently been held to require prior *intentional* discrimination to justify imposition of racial classifications: *Washington v. Davis,* 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). See also, *Personnel Adm's of Massachusetts v. Feeney,* 442 U.S. 256 (1979). As this Court stated in *Arlington Heights, supra,* ". . . official action will not be held unconstitutional solely because it results in a racially disproportionate impact." 429 U.S. 252, at 264-265.

Respondents have never contended that their actions were necessary because of any violation of Title VII. Even had they so contended, there is still the serious question, not yet resolved by this Court, as to whether non-intentional, non-purposeful discrimination by public entity employers constitutes a violation of Title VII of the Civil Rights Act, under the 1972 Amendments to that Act. Although that question need not be resolved by the Court in this litigation, we note in passing that the legislative history of the 1972 amendments (not presented to this Court in *Weber*) supports the conclusion that the preferences granted by Responents here are forbidden by the Act.

Much of the debate over the 1972 amendments revolved around the "Philadelphia Plan," which had been upheld as valid by the Court of Appeal the previous year. *Contractors Assn. of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971). That Plan was mandated by two Executive Orders in June and September of 1969, requiring bidders on any federal, or federally-assisted, construction contract for projects in a five-county area around Philadelphia to submit an affirmative action plan. The Plan was upheld by the Third Circuit, emphasizing that the Plan was a response to serious, established discrimination by both contractors *and* unions in the past.

In the Senate and House debates, there was opposition to the Philadelphia Plan as inconsistent with the notion of equal employment opportunity. See Statements of Senator Ervin, in "Legislative History of the Equal Employment Opportunity Act of 1972" (prepared by the Sub-Committee on Labor, U.S. Senate, November 1972) at 1042-1045.

In House debate, there was an especially important discussion about Title VII and "reverse discrimination." Congresswoman Green opposed racial quotas, believing them inconsistent with the principle of equal employment opportunity. *Ibid.*, at 210-211. Congressman Hawkins assured her that quotas indeed were illegal under Title VII. He stated:

> "Again, some say H.R. 1746 seeks to establish quotas, special treatment, and *discrimination in reverse.* Not only does Title VII prohibit this—it establishes, beyond any doubt—a prohibition against any individual, *white as well as black,* being discriminated against in employment. It seeks only to insure that persons will be treated on their individual merit and in accordance with their qualification." Ibid., at 206 (Emphasis added)

Further, Congressman Hawkins reiterated this point:

> "May I just try to clarify the issue as to what the present law is. It says that it shall be an unlawful employment practice for an employment agency or an employer to fail to or refuse to refer for employment or otherwise to discriminate against any individual. . . . I read that to mean any individual, any person who believes he has suffered *reverse discrimination* has the same protection under the law as the person who believes he has been discriminated against because he happens to be black." *Ibid.*, at 212 (Emphasis added)

Thus, any supposed claim of mere "adverse impact," under Constitutional or statutory standards, must be rejected.

III.

EVEN IF RESPONDENTS HAD SHOWN THAT USE OF RACE WAS NECESSARY TO THE ACCOMPLISHMENT OF A COMPELLING INTEREST, THE AAP IN TEXT, AND AS IMPLEMENTED, WAS NOT NARROWLY TAILORED TO THE ACHIEVEMENT OF THAT INTEREST

In *Fullilove v. Klutznick, supra,* this Court took great pains to indicate that a Congressional "set-aside" for minority contractors, to accomplish the objective of remedying past discrimination, was "narrowly tailored to the achievement of that goal." 100 S.Ct. 2758, at 2776. The Court's analysis included recognition that:

> "Although the statutory M.B.E. provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible." *Fullilove, supra,* at p. 2769.

Fullilove follows a line of cases holding that where the government acts to the detriment of an individual's constitutionally protected rights, it must show that there are no alternative ways of achieving a legitimate governmental interest. See, for example, *McLaughlin v. Florida,* 379 U.S. 184 (1964).[11]

There are several aspects in which the Respondents' AAP, both in text and in implementation, fails to meet the standards set forth in *Fullilove* and its predecessors.

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[11]Similarly, this Court has recognized in employment cases that the intrusiveness of remedies on the rights of innocent parties must bear some relationship to the nature and quality of prior discrimination, if any, against the particular group. *Franks v. Bowman Transportation Co., Inc.,* 424 U.S. 747 (1976); *International Brotherhood of Teamsters v. U.S.,* 431 U.S. 324, 372 (1977).

A. The Program as Implemented Totally Excludes Caucasians and Males from Competition for Certain Entry Level and Promotional Positions.

The AAP as implemented resulted in certain positions, at both the entry and promotional levels, being completely set aside for either minorities or women, violating the standards set forth by Justice Powell in *Bakke,* where he stated that a complete exclusion of non-minorities from competition for positions violates the Fourteenth Amendment. *Bakke, supra,* 438 U.S. 265, at 374.

The situation is also sharply distinguishable from *Kaiser Aluminum Chemical Corp. v. Weber,* 443 U.S. 193 (1979), where the Court noted that the Kaiser Plan did not "create an absolute bar to the advancement of white employees." 443 U.S. 193, 208. Major components of Respondents' plan, as implemented, resulted in an absolute bar.

Turning from the aspects of Respondents' plan having all the subtlety of a blunderbuss, we turn to the components of the plan wherein racial or sex preference was granted so that lesser-qualified persons were promoted over those more qualified.

B. The Affirmative Action Plan as Implemented Was Not "Narrowly Drawn," Even in Those Situations Where Non-Minorities or Males Were Allowed to Compete but Where Preference was Granted so that Lesser-Qualified Minorities or Women Were Hired or Promoted Over More-Qualified Persons.

Respondents' AAP was not designed to remedy past discrimination and there is no scientific or sociological relationship between a particular racial composition of a work force and the ability to reduce violence or establish rapport with inmates. The plan is not "narrowly drawn" to accomplish either end. Assuming *arguendo* that the State has a legitimate interest in somehow achieving a particular racial or sexual composition in the prison

work force, we show that the Plan as drafted and implemented was not narrowly drawn to meet constitutional standards.

1. There were and are alternative means of increasing the number of minorities and women in the Department of Corrections' work force, at all levels.

In the Trial Court, Respondents made no claim that there are not alternative means less intrusive on the rights and interests of innocent co-workers and applicants, by which an increase in the percentage of minorities and women in the work force, at all levels, can be accomplished. As the Trial Court noted, Petitioners herein do not challenge alternative means to increase the numbers of minorities and women in the work force, such as "aggressive recruiting measures, education for all personnel, including supervisors in charge of hiring, firing, and promotions, and special training classes for certain applicant groups and/or Department employees . . ." interested in hiring or promotion. Petitioners simply have no idea, from the record, (because Respondents had no idea) whether the "problem" of alleged low percentages is due to recruiting, to hiring, or to competition between a relatively low-paying law enforcement entity competing with higher-paying law enforcement entities, or whatever. The simple fact of the matter is that Respondents never attempted to show that there were no alternative, less intrusive, means by which minority or female composition of the work force could be increased.

2. The AAP has no time limitation and, on its face, continues indefinitely.

The Court in *Fullilove* emphasized the temporary nature of the Congressional "set-aside" there in question, pointing out that the set-aside would terminate upon the expenditure of the "Round II" federal funds involved. *Fullilove, supra,* at 2780 (opinion of the Court by Chief Justice Burger)

and at 2793 (concurring opinion by Justice Powell); see also *Weber, supra,* at 208.

The text of this AAP indicates that there is *no* time limitation and its implementation is of unlimited duration. Indeed, the goal of the AAP will not be achieved if it is only temporary, since the composition of the Department's work force cannot continue to "mirror" the inmate population, if the latter population fluctuates. Fluctuation is a key matter as far as the Department is concerned, both now and for the indefinite future, as the preferences to be granted (and, therefore, the burdens imposed), vary literally from institution to institution, depending on how the particular institution in question is meeting its "goals". The chances of the same two people, one a minority and one a non-minority, may vary with regard to job opportunities, depending on whether or not goals have been met (i.e., "parity" achieved) at the *particular institution involved.* R.T. 309:10-19; R.T. 376:18-20. If "parity" has not been reached with the inmate population at a particular facility, or even in a state-wide classification, then the "minority" receives preference. If "parity" has, in fact, been reached with the inmate population, then the Department simply hires or promotes the most qualified person. R.T. 691:12-26.

In short, given the wide variance of inmate population, either on an institution-by-institution or a state-wide basis, the Plan by its own terms must continue indefinitely. Respondents have never contended to the contrary.

3. Respondents have not even attempted to show that there are no alternative means of establishing rapport with minority inmates, thus lessening violence in the prisons.

The testimony of Respondents' own witnesses, on cross-examination, and the testimony of Petitioners' expert and non-expert witnesses, amply support the Trial Court's conclusion that there was no nexus *in fact* between the race

of a correctional officer, or the racial make-up of the correctional work force, and the ability of an officer in particular, or that work force in general, to establish rapport with an inmate or a group of inmates, of a particular race. Respondents failed to establish that any such nexus exists, much in the same way that the University of California was unable to show that doctors of a particular race have either the inclination or the ability to provide better health-care delivery to deprived citizens of that same race or ethnic group. See *Bakke, supra,* at 310-311.

Respondents made no attempt to negate other means by which correctional officers, of all races, could better establish "rapport" with inmates of various minority groups; to establish that informal "rap" sessions can not be held between inmates and correctional officers to improve relations; to prove that educational classes will not increase the understanding that correctional officers have of inmates, their backgrounds, and their cultures, etc. Petitioners' expert, Dr. Thomas Szasz, testified that the ability of a correctional officer to establish rapport with members of the same race, or another race, or with members of their sex or the opposite sex, varies from individual to individual. Moreover, the attributes of an individual correctional officer which determine whether inmates like or do not like him/her is determined by the personal behavior and attitudes of the officer toward inmates, rather than whether or not he/she is the same race. R.T. 754-755. The ability of the correctional officer to establish rapport depends more on the personality and life experience of the correctional officer than his/her race or sex. R.T. 755-757. Thus, as noted in *Bakke*, 438 U.S. 265, at 311, a caucasian raised in a disadvantaged community may be far more likely than a "minority" person, who did not grow up in a disadvantaged community, to have a commitment to curing the problems of disadvantaged citizens.

In sum, Respondents made no effort to establish alternative means, such as emphasizing recruitment of disadvan-

taged job applicants, establishing a myriad of educational classes, group sessions, and the like, to increase rapport between inmates and correctional officers, thereby potentially reducing violence in the prisons.

4. The AAP as drafted and implemented does not contain the flexibility necessary to meet constitutional standards.

In *Fullilove*, Chief Justice Burger emphasized the crucial nature of flexibility in any "race-conscious" remedial legislation. In his opinion he stated that it "is significant that the administrative scheme provides for a waiver and exemption." *Fullilove, supra*, at 2779. The opinion emphasized that a waiver could come, upon request of a non-minority grantee, for example, where qualified, *bona fide* minority firms cannot be found. The waiver process could also be invoked when the bid of a minority firm was unreasonably priced, or where the minority firms in question *had not been adversely affected by prior discrimination.* The Court stated:

> "There is also an administrative mechanism, including a complaint procedure, to ensure that only *bona fide* MBE's are encompassed by the remedial program, and to prevent injust participation in the program by those minority firms *whose access to public contracting opportunities is not impaired by the effects of prior discrimination.*" *Fullilove, supra,* at 2776. (Emphasis added).

Here, there is no flexibility nor any means by which disputes over entitlement to preference as a "minority" exists. As found by the Trial Court, Respondents "have no scientific or objective basis whatsoever by which they classified people into one racial category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants." Pet.App. F pp. 5-6. There is "no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another. can complain, or by which a person complaining

of the categorization of another person may complain." Findings of Fact, No. 16, Pet.App. pp. 5-6.

Thus, under Respondents' program, it is possible for a woman of Irish descent to marry a Mexican-American with a Spanish Surname, and thereafter to receive preference under the Department's AAP. Even the Director referred to the categorization process, and the lack of a dispute-resolution procedure, as "unscientific." See R.T. 290-300, and R.T. 290: 18-27, in particular.

The Department has no rule as to whether a person who is "one-half" "minority" descent qualifies under the Plan, or "one-fourth," "one-eighth," "one-sixty-fourth," and so on. The record amply supports the conclusion of the Trial Court that the arbitrary and capricious nature of the racial categorization process, and the lack of a dispute-resolution procedure, deprives employees of procedural due process of the law under the Fourteenth Amendment. See Conclusion of Law, No. 3, Pet.App. F., pp. 7-8. The situation is sharply different from that described in *Fullilove,* where the Plan in question was flexible to insure that minority contractors *not disadvantaged by prior discrimination* would not benefit from the "set-aside." Here, there is no means of insuring that improper self-identification by an applicant as a minority cannot occur; that such identification will be rectified; or that a non-minority person, who simply has a "Spanish Surname" (such as "Romero", which can be Spanish, Italian, Portugese, Mexican, or "Latino") and potentially no ability better to relate to people of Latin-American ancestry, will not benefit from the Plan.

5. The program was not the product of Collective Bargaining and, as such, has a broader impact upon innocent co-workers in terms of promotional opportunities and in terms of the perceived legitimacy of the plan.

In *Weber, supra,* this Court narrowly approved a limited duration plan that was the fruit of consensual, arms-length

collective bargaining between an employer and a union, both of whom were arguably *in pari delicto* in regards to past employment discrimination against minorities.

As is obvious from our record, the AAP was not the product of collective bargaining or negotiations; indeed, CCOA, a recognized employee organization for correctional officers, vigorously opposes the plan.

We respectfully suggest to the Court that "narrowly drawn" attempts to deal with a problem (or "least intrusive" means, in the employer-employee relations context) must involve bargaining with the recognized representative of the employees affected. Such a plan, even if it adversely affects the interests of innocent co-workers, may well appear more legitimate to them and be therefore perceived as less onerous. They will have had the opportunity to make their feelings known, through the democratic process within their union, as to how the plan is to function, its duration, and whether, in fairness, the employer should make an effort at giving everyone "a little bit bigger pie." In short, we suggest that *the process* itself, where a plan is imposed upon innocent co-workers, is inextricability tied to whether or not the remedy in question is "narrowly drawn" or "least intrusive" (see, in general, *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 [1975]). Hence, a significant element in *Weber* was the desire to allow and/or encourage employers and unions to self-examine and self-evaluate their employment practices. *Weber,* supra, at 204.

A Plan jointly negotiated may well have a less intrusive impact upon innocent co-workers, as in *Weber,* where a new benefit (a training program to increase the promotional opportunities for all in-plant employees), was established in return for a modification of the seniority provisions there in question.

There may well be other "trade-offs" agreed upon by management and labor to meet the interests of co-workers, already hired, in promotional opportunities. We note, for example, the line of cases indicating that, even where past discrimination has been shown, a distinction should be made between the expectations of employees who have already committed to the employer in question, and their expectations, and the interests of applicants for entry-level jobs, who have not so completely burned their bridges. See *Chance v. Board of Examiners,* 534 F.2d 993 (2nd Cir. 1976); *Kirkland v. New York State Department of Correctional Services,* 520 Fed.2d 420 (2nd Cir. 1975).

Thus, the impact of "affirmative action" may be shifted, and the benefits and burdens less drastically distributed, when the plan is collectively bargained as opposed to unilaterally imposed.

IV.

THE RESPONDENTS HAVE FAILED TO ADVANCE AND PROVE AN IMPORTANT GOVERNMENTAL INTEREST NECESSARY FOR THE USE OF GENDER-BASED CLASSIFICATIONS.

To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental purposes and must be substantially related to achievement of those objectives. *Orr v. Orr,* 440 U.S. 268 (1979); *California v. Webster,* 430 U.S. 313, 316-317 (1977); *Craig v. Boren,* 429 U.S. 190, 197 (1976). The California Supreme Court has held sex to be a "suspect classification," subjecting such classification to strict scrutiny and thereby creating greater protection for either sex than under federal authorities. *Sail'r Inn v. Kirby,* 5 Cal.3d 1 (1971). Here the Respondents made no attempt to justify preference granted on the basis of sex by articulating and proving either a compelling interest or an important governmental interest to be served.

Indeed, on the facts of this case it is difficult even to imagine *any* substantial relationship between the preference and the achievement of any governmental interest, articulated or not.

As described earlier, (at p. 16, *supra*), Respondents advanced only passing reference to the assertion that women purportedly brought "an extra dimension or quality" to the job. One of Respondents' witnesses indicated that women made the dining room more orderly and well-behaved, while another claimed they made "a very abnormal environment a little more normal." One of Respondents' witnesses astoundingly testified that female correctional officers were better able to rehabilitate rapists (R.T. 614) and other criminals. (R.T. 615). Assuming that this constituted the articulation of an important government interest, the Trial Court did not prohibit the use of sex in appropriate *job assignments* (Conclusion of Law, No. 4, Pet.App.F, p. 8).

Furthermore, there is no apparent relationship between the accomplishment of such a government interest and the adoption of preferential *hiring* and *promotions* based upon percentage of women in the overall California labor pool; nor would this be a narrowly tailored remedy to justify the infringement of the employment expectations of innocent males. In short, there was no evidence at trial to show what desired level of female employment, if any, would satisfy the purported government interests in "gentility", if you will.

Prior intentional discrimination cannot here be the governmental interest to be served, since the Respondents disclaimed prior intentional discrimination on the basis of sex (*supra,* footnote 9, p. 15). Although this binding disclaimer contained an assertion that there had been adverse impact in hiring and promotion, there was no trial evidence to support it. In fact, at trial, Respondents confessed ignorance of the percentage of women employed

by the Department as compared to the percentage of women who applied (R.T. 281-282). The AAP itself demonstrated that there was no adverse impact in promotions: 17.3% of the Department's personnel were women, but over 20% of all promotions were received by females (see *supra,* pp. 40-41).

While statistics may be probative and can establish a *prima facie* case under Title VII, they are not conclusive on the issue of discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). Had the Respondents engaged in prior discrimination, the percentage of women in the total California labor force would not be the appropriate benchmark for affirmative action. This Court, and other courts, look to the *relevant labor market,* including the relevant geographical areas, *Hazelwood School District v. United States,* 433 U.S. 299 (1977), and the qualified applicant pools, *Equal Employment Opportunity Commission v. United Virginia Bank,* 615 Fed.2d 147 (4th Cir. 1980); *EEOC v. Chesapeake and Ohio Railway,* 577 Fed.2d 229 (4th Cir. 1978). Because Respondents never seriously contended at Trial that they had discriminated against women,[12] this Court does not know the relevant geographical pool. Presumably, it varies from facility to facility, or at least between various geographical areas. Respondents made no showing whatever as to the relevant labor market for entry-level correctional officers.

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[12]Respondents would have been precluded from contending they had discriminated against women in general by the doctrine of collateral estoppel. The Court of Appeal in *Long v. State Personnel Board,* 41 Cal.App.3d 1000 (1974), had previously upheld Respondents' policy (there vigorously defended by Respondents) of issuing "male only" certifications in a correctional setting. See also, *Dothard v. Rawlinson,* 433 U.S. 321 (1977).

V.

THE CONSTITUTIONAL CONTOURS OF A PROPER REMEDIAL PROGRAM, DESIGNED TO REMEDY PRIOR PAST DISCRIMINATION, MUST UTILIZE TRADITIONAL PRINCIPLES OF EQUITY AND MUST TAKE INTO ACCOUNT THE LEGITIMATE EXPECTATIONS OF CO-WORKERS AND CO-APPLICANTS OF ALL RACES AND BOTH SEXES.

Lawyers familiar with the constitutional issues presented to this Court for last five years, in this and similar cases, have formed some notion of the contours of a constitutional plan or program, designed to remedy actual past discrimination against minorities and/or women. The AAP of the Department was neither intended, designed, nor operated to remedy past discrimination. Even had it been so designed, it fails to meet the constitutional standards of a racially-or-sexually conscious remedial program.

Such standards were articulated most eloquently by this Court in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), where the Court had before it the established principle of awarding proven discriminates their "rightful place" with regard to seniority. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). In *IBT*, this Court was confronted with a number of potential discriminatees harmed by the acts of the employer and the question was how such past discrimination should be remedied. This Court first indicated that actual victims of discrimination should be identified, *Ibid.*, 431 U.S. 324, 370-372, and then went on to state:

> "After the victims have been identified, the Court must, as nearly as possible" 're-create the conditions and relationships that would have been had there been no' "unlawful discrimination." *Ibid.*, citing *Franks*, 431 U.S. 324, at 372.

The Court next stated standards which, we submit, are as applicable, if not more so, in this constitutional context

as they were in the statutory context of *IBT*. The opinion stated that a Court:

> "Must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and the private needs as well as between competing private claims.' [citations omitted]. Especially when immediate implementation of an equitable remedy threatens to infringe upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.' [citations omitted]" *Ibid,* 431 U.S. 324, at 374-375.

The flexible, equitable, and humane standards proclaimed by this Court should be no less binding upon a public employer, allegedly fashioning a remedy for its confessed past discrimination, than for a Court, whose *finding* of past discrimination must be the basis for any equitable remedy. Indeed, in the context of constitutional protections, public entities must be held to no lower standards than those by which our inferior judicial courts are bound.

VI.
CONCLUSION

This case presents the Court with a grave and crucial issue: May a local governmental entity, absent any prior discriminatory conduct, categorize its citizens by race and by sex, and then grant preferences and impose burdens in public employment? Persons of good will on both sides of this key constitutional and social question ultimately desire a society that is indeed "color blind", a society in which every person will be judged on the basis of merit and ability, without regard to race, sex, ethnic origin, or other irrelevant attributes.

If our local governmental entities themselves may impose racial and sex-based classifications upon their citizens, and grant preferences and impose burdens based thereon, we will only move further away from our ultimate societal goal, thereby reinforcing those shameful and antiquated aspects and attitudes of our social fabric that still remain racist and sexist.

For all of the foregoing reasons, Petitioners respectfully request that the judgment of the Court of Appeal of the State of California be reversed, with instructions to reinstitute the JUDGMENT and PERMANENT INJUNCTION of the Trial Court.

Respectfully submitted,

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No. 79-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WAYNE MINNICK, *et al.*,
Petitioners,

v.

CALIFORNIA DEPARTMENT
OF CORRECTIONS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Is the decision of the California Court of Appeal which contemplates further state court proceedings a final judgment?

2. Do the State courts have jurisdiction over actions brought under Title VII of the Civil Rights Act of 1964?

3. Does Title VII prohibit the California Department of Corrections from voluntarily adopting a race- and sex-conscious affirmative action employment program which imposes no mandatory quotas and is designed both to remedy the continuing consequences of past discrimination and to further other compelling correctional objectives?

4. Does the Equal Protection Clause of the Fourteenth Amendment bar the California Department of Corrections from voluntarily adopting a race- and sex-conscious affirmative action employment program which imposes no mandatory quotas and is designed both to remedy the continuing consequences of past discrimination and to further other compelling correctional objectives?

PARTIES

Petitioners are identified in the Brief for Petitioners. Respondents are the California Department of Corrections and Ruth L. Rushen, as Director of the California Department of Corrections, who succeeded Jiro J. Enomoto on April 22, 1980. *See* Sup. Ct. R. 40.3. The judgment entered by the California Superior Court did not run against Carlos Sanchez, formerly Assistant Director of the Department of Corrections, nor did it run against the California State Personnel Board. *See* Petn. App. E2, F2, G1; R.T. 279, 1495. Petitioners did not cross-appeal from the failure to include these parties in the judgment and therefore they are no longer parties to these proceedings.

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No. 79-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WAYNE MINNICK, *et al.*,
Petitioners,

v.

CALIFORNIA DEPARTMENT
OF CORRECTIONS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR RESPONDENTS

STATUTES INVOLVED

In addition to the constitutional provisions and statutes cited by Petitioners (Pet. Br. 2; Pet. App. H), this case involves California Government Code §§18930, 19702, 19702.1, 19702.2, 19702.5 and 19790-97 and California Labor Code §§1413 and 1420. These are set forth in Appendix A.

STATEMENT OF THE CASE

Petitioners, two white male correctional officers and the California Correctional Officers Association, filed this action in the California state courts in December 1975, contending that the Affirmative Action Plan voluntarily adopted by the California Department of Corrections on July 1, 1974, discriminated against white males in violation of various state and federal

constitutional and statutory provisions. C.T. 6-7, 69.[1] The individual petitioners alleged that they had been denied promotions because they were Caucasian. C.T. 8, 10, 69-73.[2] After an order to show cause was issued (C.T. 34), the parties stipulated that the hearing on the preliminary injunction was to be considered the trial on the merits. C.T. 105.

In answer to a pretrial interrogatory, before the decision by the California Supreme Court in *Bakke v. Regents of the University of California,* 18 Cal. 3d 34 (1976), *aff'd in part, rev'd in part,* 438 U.S. 265 (1978) (hereafter "*Bakke*"), the Department stated that "for purposes of this litigation" it did not allege that it had "wilfully, with a specific intent" engaged in illegal or improper discrimination against individuals on the basis of race, color, sex, or national origin; it did, however, allege that its past hiring and promotional practices and procedures had had an adverse discriminatory impact on minorities and women. C.T. 122-23.[3] Some evidence of past discriminatory practices within the Department was introduced during the trial,[4] and substantial evidence was offered to show

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[1] The Clerk's Transcript will be cited as "C.T."; the Reporter's Transcript as "R.T."; the appendices to the Petition for Writ of Certiorari as "Petn. App."; and the Brief for Petitioners as "Pet. Br."

[2] The action was brought as a class action. C.T. 2. Petitioners' post-trial motion to certify the case as a class action (C.T. 1143-44) was denied, upon a stipulation that the named plaintiffs had standing to obtain prospective relief despite the failure of proof as to their own claims. R.T. 1465-68. The Court of Appeal questioned the validity of this stipulation and indicated that these questions should be examined if the case is retried. Petn. App. A23-24.

[3] Petitioners' brief asserts that Respondents "filed a binding answer to interrogatories denying that they had ever previously engaged in any prior discrimination." Pet. Br. 3; *see also id.* 15, 31-32. Petitioners thus mischaracterize the content of the Department's answer. Moreover, interrogatory answers are not binding in California. *Williams v. American Cas. Co.*, 6 Cal. 3d 266, 275, 98 Cal. Rptr. 814, 820 (1971). *Cf.* Advisory Committee's Note to Rule 33(b), 48 F.R.D. 487, 524 (1970).

[4] With respect to racial discrimination, *see, e.g.*, Ex. "Q"; R.T. 212-13, 338, 370-72, 443, 681, 706-708, 774, 824-25, 867-73, 879, 883, 903. With respect to sex discrimination, *see, e.g.*, Ex. "I"; R.T. 555-57, 608, 698. At several points, the Superior Court appeared to acknowledge the existence of prior discrimination, and to suggest that no further proof was necessary to establish that fact. R.T. 344, 380, 426-27, 661-62, 708, 883.

that the Department's Affirmative Action Plan was adopted to remedy a marked underrepresentation of minorities and women in the Department's work force, especially at supervisory levels.

This evidence revealed that historically most of the institutions within the Department were staffed almost exclusively by white males. R.T. 547, 593, 879, 892-893; *see also* C.T. 502. In 1968, when the Department of Corrections initiated its first informal affirmative action efforts, minorities constituted approximately 9.5% of the Department staff. Ex. "Q" at 1; R.T. 885. In 1973, shortly before the formal Affirmative Action Plan was adopted, minority members accounted for 19.8% of the Department's total personnel, in contrast with 23.7% of the California labor force. Ex. "G" at 26; R.T. 527; Ex. "R", Table 1A, R.T. 1494. The corresponding numbers for the prisons alone—i.e., excluding the Parole Division and Central Office—reflected even greater underrepresentation of minorities, particularly at certain institutions. Ex. "G" at 29; R.T. 527. For example, at the Sierra Conservation Center at Jamestown, the staff consisted of only 0.5% blacks and 3.2% Mexican-Americans; at the California Men's Colony at Corona, there were only 2.2% blacks and 4.8% Mexican-Americans; and at the California Conservation Center at Susanville, only 1.2% were black and 3.1% Mexican-Americans. *Id.* at 30. With clerical and lower level positions excluded, the disparity was still more pronounced. *Id.* at 21-22, 33-34.[5]

Due to their concentration in lower-level positions, the Department's minority employees earned less than their white counterparts. As of September 1973, 69.7% of the Caucasian personnel earned $900.00 per month or more, while the

[5] For example, in September, 1973, the Department employed 186 Correctional Lieutenants, of which 176 were Caucasian, eight were Spanish-surnamed and two were black. Ex. "G" at 34. Of 400 Correctional Sergeants, 355 were Caucasian, 22 Spanish-surnamed, and 20 black. *Id.* Thirty-one of 33 Correctional Counselor IIIs were Caucasian, as were 65 of 73 Correctional Counselor IIs. *Id. See also* the documentation submitted with the Motion to Augment Record. C.T. 704, 832-33, 836, 848-49, 853, 875, 883, 889, 899, 909-10, 926, 932, 936, 940, 944-45, 947-48, 951, 955, 964, 967-68, 976-77.

If the "traditional census undercount of minorities" and the apparent increase in the proportion of the minority population since 1970 are considered, see California Advisory Committee to the U.S. Commission on Civil Rights, *California State Employment* 2 (1980), the disparity is even greater.

comparable figures for blacks and Spanish-surnamed personnel were 46.3% and 45.2% respectively. *Id.* at 32. The monthly weighted average salary for Caucasians was $1,116.86; for blacks, $998.98; and for Mexican-Americans, $970.91. *Id.* at 31.

Much the same was true with respect to female employees. As of September 1973, only 17.3% of the Department's total personnel was female, in contrast to 38.1% of the California labor force. *Id.* at 27. At the institutions, the percentages were significantly lower: at only two institutions (one of which was the California Institution for Women) did the proportion of female employees exceed 13%, and at many it was considerably less. *Id.* at 31. Moreover, more than 75% of the female employees were in clerical positions. *Id.* at 35. While only 26.6% of the Department's male employees earned less than $900 per month, 76.3% of female employees earned less. *Id.* at 32. The monthly weighted average salary for males was $1,091.71, while for females it was $795.01. *Id.* at 32.

The underrepresentation of minorities and women was not accidental. The record demonstrates, for example, that the low number of minorities in supervisorial positions resulted not only from a shortage of minority employees in entry level positions, but also from the fact that interview panels consisted almost exclusively of white males, whose prejudices unquestionably influenced the consistently low evaluations of minority officers. *E.g.*, R.T. 372, 824-25, 833, 872-73, 883.[6] Written tests also discriminated against minority groups. R.T. 370-71. Minority officers within the Department customarily received less desirable duty and shift assignments and were completely excluded from some posts. R.T. 212-13. As a result, the Department had difficulty retaining its minority employees, let alone promoting them. *See also* Appendix B.

The evidence also reflected the sharp contrast between the minority inmate population and the correctional work force. In 1973, the total inmate population contained 32.2% blacks, in

[6] For example, one middle-level manager—whose testimony Petitioners quote at length (Pet. Br. 7-8)—told a superior that he believed minorities were less qualified than whites. R.T. 774. This individual promoted only white employees. *Id.*

contrast to 8.8% within the correctional force, and 17.3% Mexican-Americans, in contrast to 7.4% of the work force. *See* Ex. "G" at 26. The evidence brought out the widespread presence of racial gangs throughout California's prisons (R.T. 340-41, 476, 560, 627, 899), and the ever-present danger of racial violence. *E.g.*, R.T. 548-64, 896-99; C.T. 494-96, 500-05, 510-11, 525-27, 541-42, 560-61.

It was against this background, and in response to mandates from California's Legislature and Governor (Ex. "G" at 48; *see* pp. 37-41, *infra*), that the Department's affirmative action efforts were initiated in 1968-69, and formalized in 1974. Exs. "G", "Q", "R", R.T. 338; *see also* C.T. 704-05, 710. The Affirmative Action Plan is predicated upon a detailed statistical study of the underrepresentation of minorities and women throughout the Department. Ex. "G" at 25-39; *see also* Ex. "Q". Its principal elements are summarized in the Statement of Policy appearing at the front of the formal program documents:

> "In order to insure compliance with equal employment opportunity laws and departmental policy, a formal Affirmative Action Program has been developed for immediate implementation. Specific actions required by this plan will include:
>
> A. Increase the number of minorities and women employees at all levels by implementing programs for recruiting, selecting, hiring and promoting minorities and women.
> B. Establish a monitoring system of all employment practices related to the employment of women and minorities.
> C. Establish specific goals, timetables and records for measuring success or failure in complying with laws of nondiscrimination.
> D. Provide in-service training that will develop a sensitivity in staff to recognize and positively deal with discriminatory practices, and provide training for women and minority employees that will assure their full participation at all levels of employment.

E. Insure that all employees have equal employment opportunities and equal treatment.

F. Insure that each institution, parole region and Central Office develop an Affirmative Action Plan that is in keeping with the departmental guidelines.

G. Insure that disciplinary action will be taken, as in any violation of major departmental policy, in instances where administrators or individuals give inadequate cooperation or obstruct the goals of the program." (Ex. "G" at 1).

The Plan's objective is "[t]o increase significantly the utilization of minorities and women across organizational units of the CDC and at all levels possible as vacancies occur." Ex. "G" at 10.[7] The Plan incorporated the then-current Guidelines issued by the federal Law Enforcement Assistance Administration,[8] which directed that the percentage of minority groups in the work force, within five years, be at least 70% of the minority percentage in the inmate population. Ex. "G" at 11-12; *see* R.T. 665-66.[9] The Plan's goal for female hiring is to achieve a proportion of women in the correctional work force corresponding to the proportion of women in the California labor force. *Id.*

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[7] According to the then Deputy Director, the goal of the program was, "very simply . . . to make the Department of Corrections a fair place to work." R.T. 665. *See also* R.T. 338. As further documented in the materials submitted with the Motion to Augment Record, the Plan was "designed in part to bring these discriminatory practices to an end and to undo the effects of these practices over so many years." C.T. 710; *see also* C.T. 969; R.T. 338, 665, 707; Exs. "G", "Q", "R". The Plan was also designed to lessen racial strife among inmates for which the discriminatory practices were considered partially responsible. *See* C.T. 703-04.

[8] 38 Fed. Reg. 23518 (1973). *See* Ex. "G", pp. 40-47; ABA Commission on Correctional Facilities and Services, *Minority Recruitment in Corrections—New Federal Aid Requirements* (1973); Skoler & Loewenstein, *Minorities in Correction—Nondiscrimination, Equal Opportunity, and Legal Issues*, 20 Crime & Delinquency 339, 345-46 (1974); *Hardy v. Leonard*, 377 F. Supp. 831, 835 n.2 (N.D. Cal. 1974). On February 16, 1977, these regulations were amended. *See* 42 Fed. Reg. 9493 (1977); 43 Fed. Reg. 28795 (1978). C.T. 586-601.

[9] In 1979, the Department slightly revised and extended its Affirmative Action Plan for an additional five years. A copy of the current Plan has been lodged with the Clerk.

In implementing the Plan, the Department has adhered to all civil service requirements and procedures. Applicants take written and oral examinations administered by the State Personnel Board and are ranked on certification lists according to their test performance. Cal. Gov't. Code §§ 18930, 18936. In making selections from the list, the Department is limited to the top three individuals or ranks who choose to be considered for the particular opening. Cal. Gov't. Code §§ 19057, 19057.1; 2 Cal Admin. Code §§ 254, 254.1; *see* R.T. 15-16, 20-23, 198-99, 214; Ex. 10, R.T. 90. It is only within the statutory selection process, among those found eligible under racially-neutral criteria, that consideration is given to the race and sex of applicants in making hiring and promotional decisions.[10] The policy at all times has been to hire and promote only the most qualified applicants (R.T. 194, 203-06, 333-34, 383, 452-53, 483, 487-88, 548, 563-64, 591, 666, 668, 672, 773, 777-78, 792, 882; Ex. 35, R.T. 727);[11] nonetheless, given the absence of minority personnel and the composition of the inmate population, the fact that a well-qualified applicant is a minority member is a factor which may enhance that applicant's qualifications for the particular position. R.T. 227-28, 284, 372-74, 382-83, 453-54, 498-99, 600, 793. Some Departmental representatives testified that if competing applicants were "reasonably equally qualified," the minority applicant would be selected. *E.g.*, R.T. 289, 601; *see* Ex. 16, p.3. However, as explained by other witnesses, the underlying concept is that the race and sex of applicants be considered in relationship to the needs of the position being filled, along with the many other factors that bear upon an individual's qualifications. *See* R.T. 195-97, 382-83, 488, 666-77, 707-08.

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[10] Efforts are also made to recruit or train minority members for openings that develop, but special training and staff development assignments, transfers and the like are made only in accordance with civil service requirements (*see, e.g.*, R.T. 214-17, 266-69, 345-51, 389-92; Ex. 2, p.2, R.T. 43, 45; Ex. 16, p.3; R.T. 101) and have not been challenged in this litigation. C.T. 68; Petn. App. F4. The Department has also requested that a small number of positions be certified by the State Personnel Board as limited to female only. *E.g.*, Ex. 24, R.T. 260, 394.

[11] Contrary to repeated statements throughout the Brief for Petitioners (e.g., Pet. Br. i, 9-10 13, 16) no evidence was introduced that a lesser qualified applicant was ever selected in preference to a more qualified non-minority male applicant, nor did the Superior Court enter any such finding.

The Department acknowledged that there has been some misunderstanding concerning the operation of the Affirmative Action Program (R.T. 664), and the record contains some evidence—upon which Petitioners heavily relied—suggesting that under the Department's program only minority or female candidates would be considered for some positions. *E.g.*, Ex. M., R.T. 685, 686; Ex. 1, R.T. 38, 45; Ex. 2, R.T. 43, 45; Ex. 28, R.T. 462, 465. However, Department officials testified that this is not and never has been the policy of the Department; when such incidents were brought to the attention of the responsible administrators, they were promptly corrected. R.T. 684-86; *see* R.T. 84, 86 775-77, Exs. 35, 37, R.T. 862; Ex. 11, R.T. 97; Ex. 6A, R.T. 84,86.[12]

After trial, the Superior Court issued a Notice of Intended Decision, indicating its agreement with Petitioners' contention "that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void." C.T. 375. Thereafter, the Department filed a Motion to Augment Record, requesting the Superior Court to receive detailed evidence regarding the past and continuing discriminatory practices that the Affirmative Action Plan was designed to remedy. C.T. 670-71. The proferred evidence is

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[12] One important factor that must be considered in evaluating some misstatements concerning the Department's policy quoted in Petitioners' Brief is that the statements may have been made by correctional officers hostile to affirmative action, not to correctly characterize the program, but to discredit it. *E.g., compare* Ex. "M" with R.T. 774.

Several of Petitioners' witnesses testified that the former Director of the Department had stated that white males were going to have to wait five years for promotions. *See* Pet. Br. 11. However, the Director denied this (R.T. 284-85) and his testimony was confirmed by other top administrators. *E.g.*, R.T. 369-70, 378-81, 442, 494, 678-79. The Director did state that the effect of the Department's program will be to increase the competitive pool, so that it may take somewhat longer for promotions to be obtained. R.T. 286, 369, *see also* Ex. 10.

The Court of Appeal summarized the record in this respect as follows:

> "According to all the evidence of instances where they had been applied, 'preference' was given to female sex or minority status only to the extent that each was considered a 'plus' factor in the assessment of a particular employee for promotion or transfer . . . ." (Petn. App. A6-A7)

summarized in Appendix B to this brief. The Superior Court denied this Motion, and refused the Department's request for specific findings on the subject of past discrimination, on the ground that prior discrimination was irrelevant. R.T. 1029, 1431-33.[13] Although the Court of Appeal subsequently held that the refusal to augment the record could be upheld on the procedural ground of untimeliness, this was not the ground upon which the Superior Court acted (R.T. 1432-33), and the Court of Appeal also ruled that such evidence could be considered in the event of further trial court proceedings. Petn. App. A23.

Petitioners conceded that there was no evidence that the two named Petitioners, or any other specific individual, had been denied promotions because of their race or sex (R.T. 921-24; C.T. 328-29; *see* C.T. 279-81), and no such finding was entered. However, the Superior Court felt that "discrimination against one is discrimination against all" and that "every employee in the Department, regardless of race, color, creed, background, and so on, was being discriminated against by the policy adopted by the Department." R.T. 1335-36, 1339. Accordingly, the Superior Court entered Findings of Fact to that effect (Petn. App. F4) and conclusions of law and a judgment declaring that the Department's employment practices violated the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), 42 U.S.C. Sections 1981 and 1983, as well as various provisions of California law. Petn. App. E, F7-F9.[14] It also entered a Permanent Injunction prohibiting the

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[13] The Superior Court succinctly stated its views at one hearing at which the motion was being considered:

> "THE COURT: Well, two wrongs don't make a right. And if they've been doing that in the past, it's high time they stopped, you see. That's all it amounts to. I don't see the relevance if they've been discriminating for generations." (R.T. 1029).

The Superior Court did find that the Department's Plan did not remedy *societal* discrimination (Pet. App. F5), but this finding says nothing about whether the Plan was justified by discrimination by the Department.

[14] Based upon findings recognizing "the unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system," the Superior Court provided that race or sex could be considered in determining employee job assignments and responsibilities. Petn. App. F6, G2.

Department "from hiring or promoting any employee . . . in which preference, advantage, or benefit is given to race, color, sex or national origin." Petn. App. G.

The California Court of Appeal reversed. The court concluded that although the Superior Court had properly applied the decision of the California Supreme Court in *Bakke*, under the standards established by this Court's resolution of that case, the Department's Affirmative Action Plan withstood constitutional scrutiny. Without regard to the history of prior discrimination, the Court of Appeal concluded that "there was evidence that the desired 'minority' level could serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system" (Petn. App. A5), and held that in light of "the prison-related realities of race and sex," the Department's personnel practices serve the " 'compelling state interest' in a safe and efficient correctional system." Petn. App. A15-16. With reference to the percentage goals included in the Plan, the Court of Appeal concluded:

> "This language sounds in 'quota' terms, but neither percentage figure bespeaks a 'quota' of the type proscribed in Justice Powell's opinion in *U.S. Bakke*. Each is an optimum 'quota' to the extent that it defines a goal to be attained in the future. Neither is a functional 'quota' which now operates to place either—or any—percentage of positions in the Department beyond the reach of male or nonminority employees." (Petn. App. A16).

With respect to Title VII, the Court of Appeal held that "the fact that the Department is a public employer suggests no basis for excluding it from the reach of the Congressional intent and objectives analyzed in *United Steelworkers* [*v. Weber*, 443 U.S. 193 (1979)], upholding the voluntary adoption of race conscious affirmative action plans". Petn. App. B2.

The Supreme Court of California denied the Petitioners' application for a hearing (Petn. App. "C"), and this Court thereafter granted the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The decision of the Court of Appeal is, under California law, an unqualified reversal which remands the case for a new trial. On retrial, both Petitioners and the Department will be able to present evidence concerning many pivotal factual issues which the Superior Court did not reach because it considered the granting of any racial preference in hiring and promotion to be *per se* unconstitutional. The new evidence necessarily will change the legal issues presented by the case. Thus, the Court of Appeal's decision is not a final judgment.

The state courts had no jurisdiction to consider Petitioners' Title VII claim. Congressional intent to provide for exclusive federal jurisdiction over Title VII claims is expressed both in the statutory languge—which explicitly makes numerous federal statutes and rules of civil procedure applicable to cases brought under it—and in the legislative history. State court jurisdiction would be at odds with the carefully constructed remedial scheme fashioned by Congress. Since the state courts had no jurisdiction over Petitioners' Title VII claim, it may not be considered by this Court.

Should the Court reach the merits of the Title VII claim, the Department's Affirmative Action Plan passes muster under that statute. In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), this Court held permissible under Title VII voluntary affirmative action plans designed to eliminate racial imbalance in traditionally segregated job categories. Such a plan may grant preference to racial minorities provided that it does not "unnecessarily trammel" the interests of white employees. Although *Weber* involved a program adopted by a private employer, its holding is equally applicable to a program voluntarily adopted by a state agency. Title VII applies identical standards to public and private employers, as evidenced by decisions of this Court, the language and legislative history of the 1972 legislation extending Title VII to governmental agencies, and the construction given the statute by the federal agencies entrusted with its administration. Moreover, the reasons which supported the Court's decision in *Weber* are equally applicable to public employers.

Under *Weber,* the Department's Plan is entirely permissible. The program was adopted in response to pronounced underutilization of minorities and women, reflected in a careful analysis of the Department's work force conducted by the Department prior to the adoption of its program. The program was also designed to serve the additional purposes of improving prison security and fostering inmate rehabilitation, objectives which are both proper and consistent with the Department's concurrent objective of eliminating the consequences of its prior discriminatory employment practices. Since the Department's program—which creates no mandatory quotas but simply authorizes consideration of race and sex together with other relevant characteristics in evaluating qualified applicants—affects non-minority workers only imperceptibly, and contains ample safeguards, the program conforms with the standards adverted to in *Weber.*

The Department's consideration of race also satisfies the exacting standards of the Equal Protection Clause, however those standards may be articulated. The state's interest in remedying the effects of prior identified discrimination undoubtedly justifies race-conscious affirmative action programs. The Governor of California and the California Legislature have recognized the existence of prior discrimination in the state's civil service and required state agencies to adopt affirmative action plans; similar findings have been made by Congress and the Department itself. The Department's consideration of race also is justified by the state's compelling interest in maintaining safe and secure prisons. The Department's Plan is both well tailored and necessary to achieve each of these compelling interests; no alternatives which do not involve consideration of race would work as well.

Similarly, the history of *de jure* discrimination against women within the Department justifies the gender-based portion of the Affirmative Action Plan. Under Title VII, consideration of gender for remedial purposes stands on the same footing as consideration of race. Under the Fourteenth Amendment, this Court has created standards which are less demanding than for consideration of race. Moreover, as with race, there are other compelling correctional interests which justify consideration of sex in hiring and promotion.

ARGUMENT

I.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS NOT A FINAL JUDGMENT.

The decision of the California Court of Appeal contemplates further state court proceedings. After declining to decide whether the evidence of prior discrimination proffered by the Department with its Motion to Augment Record was relevant, the court stated that "[i]f the case is to be retried," the relevance of that evidence would be determined in light of Justice Powell's opinion in *Bakke*. Petn. App. A23. The Court also noted *sua sponte* that there were "problems with [Petitioners'] 'standing' " which might affect the state courts' jurisdiction to hear the case; this question, too, the court noted would "require examination" on retrial. *Id.* at A23-24. The pendency of the retrial necessarily means that the decision of the Court of Appeal is not a "final judgment" under 28 U.S.C. §1257.

The issue of state court jurisdiction is, of course, for the state courts to decide, at least in the first instance. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *cf. Paschall v. Christie-Stewart*, 414 U.S. 100 (1973). In light of the Court of Appeal's expressed doubt on this score, it cannot be assumed that there is state court jurisdiction of the case or, therefore, that there is jurisdiction in this Court. *Cf. Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). Depending on the ultimate ruling upon the jurisdiction of the California courts, the decision of the Court of Appeal on the merits of Petitioners' constitutional claims may well be only an advisory opinion which this court is powerless to review. *Doremus v. Board of Education*, 342 U.S. 429 (1952).[15] At the very least,

[15] California courts, which are not subject to the restrictions on jurisdiction imposed by Article III, may determine the merits of causes in numerous situations where the federal courts would lack jurisdiction. *See, e.g., White v. Davis*, 13 Cal. 3d 757, 762-65 (1975)(taxpayer suits); *United Farm Workers v. Superior Court*, 16 Cal. 3d 499, 503-04 (1976)(moot case decided due to "sufficient interest and importance" of question presented).

as in *Paschall v. Christie-Stewart, supra,* the case should be remanded to the state courts so this issue may be decided. Until the state courts decide whether they have jurisdiction of this action, the decision of the Court of Appeal simply is not final.

More importantly, the retrial contemplated by the Court of Appeal may radically transform the questions presented by this case. At a retrial, the Department will be free to introduce the evidence of prior discrimination previously proferred with its Motion to Augment Record.[16] Although the Superior Court found this evidence irrelevant, Petitioners now tacitly admit that this ruling was in error, since they concede that an affirmative action plan may be constitutionally permissible if an employer has "been arguably guilty of prior employment discrimination . . . ." Pet. Br. 20; *see also id.* 31.

If, on retrial, the Department introduces the evidence of prior discrimination which the Superior Court previously refused to admit, the issues which Petitioners claim this case presents will disappear. The first "question presented" by Petitioners' Brief is whether, "*absent proof that it has engaged in previous employment discrimination,* [a State may] voluntarily establish 'goals', set aside positions, and grant preferences in public employment . . . ." Pet Br. i (emphasis added). If, contrary to the Department's contention (*see* pp. 2-4, *supra*), the Court should conclude that the present trial record does not adequately show prior discrimination within the Department, such proof unquestionably will be forthcoming on retrial.

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[16] Under California law, an appellate decision reversing a trial court judgment is, unless otherwise specified, an "unqualified reversal," which "ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings." 6 Witkin, *California Procedure* (2d ed. 1971), Appeal § 543, p. 4484. An unqualified reversal "places the parties in the same position as if the case had never been tried." *Gospel Army v. Los Angeles,* 331 U.S. 543, 546 (1947), citing *Erlin v. National Union Fire Ins. Co.,* 7 Cal. 2d 547, 549 (1936). The parties may thus amend their pleadings and present new facts and legal contentions on retrial, *Gospel Army,* 331 U.S. at 547, unless "the opinion [of the appellate court] as a whole establishes a contrary intention." *Stromer v. Browning,* 268 Cal. App. 2d 513, 518-19, 74 Cal. Rptr. 155, 158 (1968).

Similarly, the other deficiencies which Petitioners assert presently exist in the record (*see, e.g.*, Pet. Br. 13-14, 16, 27, 28) stand to be cured on retrial.

Petitioners, too, may advance their cause on remand. Since the Superior Court granted judgment for Petitioners on the erroneous legal theory that racial and gender preference is *per se* unconstitutional, the case comes to this Court with a record unilluminated by trial court findings on many of the critical issues in the case, including those relating to past discrimination within the Department, the details of the Plan's operations, the correctional interests served by the Department's program, and whether other alternatives would more appropriately further those interests.[17] On remand, both parties may be expected to offer evidence going to these matters; the findings of the trial court necessarily will shape the legal issues appropriate for review, potentially to the advantage of either party. If, for example, the Petitioners should convince the state court that the correctional purposes supporting the Department's plan can be satisfied by minority hiring goals tied to the labor force rather than to the inmate population—an issue not yet considered below—they may still obtain some relief in the California courts.

The dispositive case with respect to the non-finality of the Court of Appeal decision is *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947). There, the state court plaintiff contended that certain state action was unconstitutional; the California Superior Court granted judgment for plaintiff and the Supreme Court of California reversed. Because the California Supreme Court's decision remanded the case for a new trial, that decision was not final, inasmuch as new facts and legal claims might change

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[17] Compare C.T. 605-633, 639-652, 1076-1086, with Petn. App. F. The numerous statements in Petitioners' Brief that the Superior Court decided such issues (*e.g.*, Pet. Br. 3, 4, 12, 13, 15, 16, 18, 27, 28, 29, 39-40) are thus erroneous. Under California law a reviewing court may not assume, as Petitioners imply, that the trial court made omitted findings necessary to support its judgment. Cal. Code Civ. Proc. § 634. While the Court of Appeal made factual findings on some of these issues, which should not be disturbed by this Court unless unsupported by substantial evidence, *General Motors Corp. v. Washington*, 377 U.S. 436, 441-42 (1964), the record as to other issues is unilluminated by findings of either court.

the constitutional questions presented by the case. *Id* at 348. Here, as in *Gospel Army,* the Court should refrain from establishing constitutional doctrine—particularly in an area as sensitive as affirmative action—on the basis of a factual record still open to modification. *See also Southern Pacific Co. v. Gileo,* 351 U.S. 493, 495-96 (1956).

In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), the Court described four categories of cases in which it had accepted jurisdiction of technically non-final state court decisions "without awaiting the completion of the additional proceedings anticipated in the state courts." *Id.* at 477. In their Reply to Respondents' Brief in Opposition (at 8), Petitioners contend that this case falls within the first of these categories, *i.e.,* that here the further course of state court proceedings has been preordained by resolution of the federal issue. *See Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 479. This contention is meritless. As *Cox* explicitly states, this category includes only cases where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478. Here, because retrial is certain to affect the constitutional posture of the case, the federal issue will be affected by the proceedings to come. The case therefore does not fall within the first category described in *Cox.* Since Petitioners do not contend that it falls within any of the others—and it does not—the judgment of the Court of Appeal is not final, and this Court lacks jurisdiction over the case.[18]

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[18] There is also a question whether Petitioners have standing sufficient to give this Court jurisdiction under Article III, an issue addressed in the brief *amicus curiae* filed by the Anti-Defamation League (ADL). Petitioners did not establish at trial that any members of the California Correctional Officers Association, including the individual Petitioners, had failed or would fail to obtain a promotion because of the Department's Plan, and no stipulation was entered concerning any such facts. However, since the Department stipulated to Petitioners' standing (R.T. 1[illegible]4-67), it takes no position on the question raised by the ADL.

II.

TITLE VII DOES NOT PROHIBIT THE DEPARTMENT OF CORRECTIONS FROM VOLUNTARILY ADOPTING AN AFFIRMATIVE ACTION PLAN DESIGNED TO REMEDY THE CONTINUING CONSEQUENCES OF PAST DISCRIMINATION AND TO FURTHER COMPELLING CORRECTIONAL OBJECTIVES.

A. The State Courts Lacked Jurisdiction Over Petitioners' Title VII Claim.

The judgment of the California Superior Court purported to be based in part upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et. seq.* (Petn. App. E2), and the Court of Appeal reversed that judgment only after concluding that the Plan conformed with Title VII standards. Petn. App. B2. While the Petition for Writ of Certiorari indicated the intention to question whether the interpretation of Title VII adopted in *United Steelworkers v. Weber,* 443 U.S. 193 (1979), should be extended to "the public sector" (Petn. 21; *see also id.* 3, 21-26), Petitioners now appear to have abandoned any reliance upon Title VII (*see* Pet. Br. 22, 33; Opposition to Application for Leave to File Brief in Excess of Fifty Pages 3-4) and, we submit, properly so, since the state courts lacked jurisdiction over Petitioners' Title VII claim.

Numerous lower courts have concluded that the language and legislative history of Title VII conclusively demonstrate a Congressional purpose to place exclusive jurisdiction of civil actions under Title VII in the federal courts.[19] While the general rule is that state courts have concurrent jurisdiction of federal claims, Congressional intent to exclude such jurisdiction

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[19] *See Dickinson v. Chrysler Corp.,* 456 F. Supp. 43 (E.D. Mich. 1978); *Fox v. Eaton Corp.,* 48 Ohio St. 2d 236, 358 N.E. 2d 536 (Ohio Sup. Ct. 1967); *Lucas v. Tanner Bros. Contracting Co.,* 10 F.E.P. Cases 1104 (Ariz. Super. Ct. 1974); *see also Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079, 1084 n.5 (8th Cir.), *cert. denied,* 100 S.Ct. 2942 (1980); *cf. Batiste v. Furnco Constr. Co.,* 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975); *Hutchings v. United States Indus., Inc.,* 428 F.2d 303, 310 (5th Cir. 1970)("to the federal court alone is assigned the power to enforce compliance with [42 U.S.C. §2000e-2(a)]"). *But see Bennun v. Board of Governors,* 413 F. Supp. 1274 (D.N.J. 1976).

may be found in the language used by Congress, by incompatibility between the exercise of a federally created right and a state court forum, or from examination of the relevant legislative history. *See Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962); Redish & Muench, *Adjudication of Federal Causes of Action in State Court,* 75 Mich. L. Rev. 311 (1976). Each of these criteria supports the conclusion that Congress intended jurisdiction over Title VII claims to be exclusively in the federal courts.

Congress specifically provided that, in many important respects, federal statutes and rules of procedure would be available to expedite Title VII actions and protect the federally created rights of Title VII litigants. Thus, Title VII not only provides that the district courts "shall have jurisdiction" of actions brought pursuant to its provisions (42 U.S.C. § 2000e-5(f)(3)), but specifically provides that federal venue provisions (28 U.S.C. §§ 1404 and 1406) govern such actions (*id.*), that the "chief judge of the district court" shall "immediately" designate a judge to hear Title VII actions (42 U.S.C. § 2000e-5(f)(4)), that the district or circuit court judge so designated shall assign the case for "hearing at the earliest practicable date," that the court may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure" if the case has not been scheduled for trial within 120 days after issue has been joined (42 U.S.C. § 2000e-5(f)(5)), that "[a]ny temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure" (42 U.S.C. § 2000e-5(f)(2)), and that "any civil action brought under this section . . . shall be subject to appeal as provided in sections 1291 and 1292, Title 28" (42 U.S.C. § 2000e-5(j)). It should not be lightly inferred that Congress intended to require the state courts to import in wholesale lots provisions from the Judicial Code and the Federal Rules of Civil Procedure in order to accommodate federal litigants. *See, e.g., Minneapolis & St. Louis R.R. v. Bombolis,* 241 U.S. 211, 218 (1916).

With respect to actions which involve state agencies, Title VII is even more explicit: if efforts at conciliation fail, "[i]n the case of a respondent which is a government, governmental

agency, or political subdivision, . . . the Commission shall take no further action and shall refer the case to the Attorney General *who may bring a civil action against such respondent in the appropriate United States district court.*" If the Attorney General fails to act, aggrieved persons may bring a civil action, although "the court" may permit the Attorney General to intervene 42 U.S.C. § 2000e-5(f)(1) (emphasis added).[20]

The legislative history of Title VII also indicates that Congress intended Title VII actions to be brought only in federal court.[21] "It is significant to note that when reference was made by members of Congress to bringing actions in court, the references were to *federal court.*" *Dickinson v. Chrysler Corp.*, 456 F. Supp. 43, 46 (E.D. Mich. 1978)(emphasis in original).

The statutory scheme compels the same result. As this Court noted in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in enacting the remedial provisions of Title VII, Congress made reference to the broad powers of the federal courts to grant equitable relief: "[F]inal responsibility for enforcement of Title VII is vested with *federal courts.* The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. 42 U.S.C. §§ 2000e-5(f) and (g) (1970 ed., Supp. II) . . . . Taken together, these provisions make plain that *federal courts* have been assigned plenary powers to secure compliance with Title VII." *Id.* at 44-45 (emphasis added).

Thus, the language, legislative history and scheme of Title VII dictate that the exclusive forum for Title VII actions is federal court. Accordingly, as Petitioners now seem to acknowledge, whether the Department's Plan is proper under Title VII is not properly before the Court.

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[20] Similarly, 42 U.S.C. §2000e-6(a) authorizes the Attorney General to bring "pattern and practice" actions "in the appropriate district court of the United States." 42 U.S.C. §2000e-6(b) provides that in such cases, the Attorney General may request the chief judge of the circuit to convene a three-judge court.

[21] For example, the Interpretive Memorandum of Senate floor managers Clark and Case makes repeated reference to actions in "federal court" only. 110 Cong. Rec. 7213 (1964). *See also* 110 Cong. Rec. 13081 (1964) (remarks of Sen. Case); 110 Cong. Rec. 12708, 12722 (1964) (remarks of Sen. Humphrey).

B. The Holding in *Weber* That Title VII Does Not Preclude Voluntary Adoption Of Affirmative Action Plans Is Fully Applicable To State Agencies.

In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), this Court held that Title VII does not prohibit the voluntary adoption of a bona fide affirmative action plan that accords preference to racial minorities if the plan is "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories," *id.* at 209, and if it "does not unnecessarily trammel the interests of white employees." *Id.* at 208. Holding that Title VII "cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges [of the unfortunate and ignominious history of discrimination against the Negro in this country]," *id.* at 204, the Court upheld a craft training program which temporarily reserved a fixed percentage of places for blacks, even though there was no prior determination of illegal discriminatory employment practices.

Although *Weber* involved a private employer, the California Court of Appeal properly held that under Title VII the same standards apply to a program voluntarily adopted by a state agency. In *Dothard v. Rawlinson,* 433 U.S. 321 (1977), this Court acknowledged that in amending Title VII in 1972 to apply to governmental agencies, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Id.* at 331 n.14. *See also Washington v. Davis,* 426 U.S. 229, 263 (1976)(Brennan and Marshall, JJ., dissenting); *Regents of the University of California v. Bakke,* 433 U.S. 265, 368 (1978)(Opinion of Brennan, White, Marshall and Blackmun, JJ.). Following *Weber,* the several federal courts of appeal that have considered the question are unanimous that Title VII sanctions the voluntary adoption of race-conscious affirmative action programs by governmental agencies as well as by private employers, even in the absence of a proven history of prior

employment discrimination.[22] The same conclusion has been reached by the Supreme Courts of California and of Washington.[23] *See also* Powers, *Implications of Weber—'A Net Beneath'*, 5 Empl. Rel. L. J. 325, 333-35 (Winter 1979).[24]

Both the text and history of the 1972 legislation extending the reach of Title VII to governmental agencies confirm the soundness of this uniform judicial view. As originally enacted in 1964, Title VII was expressly inapplicable to "a state or political subdivision thereof." Section 701(a), (b), 78 Stat. 253. In the Equal Employment Opportunity Act of 1972, Congress amended Sections 701(a) and (b) to expand the terms "person" and "employer" to include "governments, governmental agencies, [and] political subdivisions." 86 Stat. 103, 42 U.S.C. § 2000e(a) and (b) (1970 ed., Supp. IV). *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976). Since the amendments did not modify the applicable substantive provisions defining unlawful employment practices by employers, Section 703(a), 42 U.S.C. § 2000e-2(a), but simply enlarged

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[22] *United States v. City of Miami*, 614 F.2d 1322, 1336 n.27 (5th Cir. 1980); *Scott v. City of Anniston*, 597 F.2d 897, 900 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1850 (1980); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 689 n.7 (6th Cir. 1979), *pet. for cert. pending*, No. 79-1080 (filed Jan. 10, 1980); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, —U.S.—, 48 U.S.L.W. 3698 (April 28, 1980).

[23] *Price v. Civil Serv. Comm'n*, 26 Cal. 3d 257, 274 n.12, 284, *pet. dismissed as moot*, —U.S.—, 49 U.S.L.W. 3244 (Oct. 6, 1980); *Maehren v. City of Seattle*, 92 Wash. 2d 480 (1979).

[24] Prior to *Weber*, it was also the consensus that the statute sanctions remedial decrees imposing upon public employers quotas and related race conscious programs to remedy judicially established prior discrimination. *See, e.g., United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978), and *see* 549 F.2d 415, 436-437; *Prate v. Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2nd Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), and *see* 583 F.2d 42 (2nd Cir. 1978); *United States v. City of Buffalo*, 457 F. Supp. 612, 640 (W.D.N.Y. 1978); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 510 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *see also* cases cited in Appelants' Opening Brief in the Court of Appeal at 41 n.23.

the applicability of those provisions to governmental agencies, there is absolutely no indication on the face of the statute of any intention to apply different standards to public bodies.[25]

To the contrary, the legislative history of the 1972 amendments reflects explicit Congressional recognition of the prevelance of discriminatory employment practices among state agencies, particularly in the field of law enforcement, and of the special need for these agencies affirmatively to correct and to eliminate the consequences of those practices. Throughout the debates, both branches of Congress repeatedly took note[26] of two then-recent reports of the U.S. Commission on Civil Rights. The first, *For All The People . . . By All The People, A Report On Equal Opportunity In State And Local Government Employment* (1969), condemned the denial of equal access for minority group members to the growing number of state and local government jobs, finding:

> "4. State and local government employment opportunities for minorities are restricted by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job.
>
> (a) A merit system of public personnel administration does not eliminate discrimination against members of minorities. It proclaims objectively, but does not assure it. Discrimination occurs both in recruiting and in selection among final applicants.

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[25] By contrast, the Federal Government remained exempt under the general definition of "employer", 42 U.S.C. § 2000e-(b), and was covered by an entirely separate section newly added to the statute in 1972. Section 717, 42 U.S.C. § 2000e-16. The enforcement provisions are substantially the same with respect to private and state employers, except that the Equal Employment Opportunity Commission ("EEOC") may not initiate a civil action against a state, but may only refer unconciliated complaints to the Attorney General for the filing of suit. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[26] *E.g.*, S. Rep. No. 92-415, 92d Cong., 1st Sess., 419 (1971); H. Rep. No. 92-238, 92d Cong., 1st Sess., 17 (1971); 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins); 118 Cong. Rec. 1070, 1816, 1819 (1972) (quoting reports); 118 Cong. Rec. 581 (1972), (remarks of Sen. Javits); 118 Cong. Rec. 590 (1972) (remarks of Sen. Humphrey); 118 Cong. Rec. 1070 (1972) (remarks of Sen. Williams); 118 Cong. Rec. 1393-1394 (1972) (remarks of Sen. Saxbe).

> (b) . . . governments have failed to undertake programs of positive action to recruit minority applicants and to help them overcome barriers created by current selection procedures.
>
> (c) Promotional opportunities are not made available to minorities on an equal basis by governments that rely on criteria unrelated to job performance and on discriminatory supervisory ratings." (*Id. 119)*

The 1969 report recommended that state and local agencies adopt programs to "undo any patterns of minority underutilization which had been brought about by past discrimination," and suggested that "[w]here patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time." *Id.* 124; 118 Cong. Rec. 1818 (1972).[27]

The second report, *Mexican Americans And The Administration of Justice in the Southwest* (1970), observed that Mexican-American citizens were "excluded from full participation in law enforcement agencies, especially in supervisory positions," *id.* at iiii, 118 Cong. Rec. 1820 (1972), and conveyed the opinion "that the fear and distrust which many Mexican Americans feel toward law enforcement agencies could be significantly dispelled by increasing the number of Mexican American law enforcement officers at all levels of authority." Report at 83; 118 Cong. Rec. 1824.

Both the House and Senate Committees that reported out the legislation[28] emphasized the serious and widespread nature

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[27] Anticipating the program subsequently adopted by the California Department of Corrections, the Civil Rights Commission recommended that governmental agencies "[d]o not in all cases give preference to non-minority applicants on the basis of higher performance on tests or other hiring criteria, as long as it is apparent that competing minority applicants, especially where they have waiting list seniority, are qualified to do the job" and that such agencies "[i]ndividually appraise the promotion potential and training needs of minority employees, and take action necessary to permit advancement." Report at 126; 118 Cong. Rec. 1818 (1972).

[28] The amending legislation as originally adopted by the House did not contain the provision extending coverage to state and local agencies, as did the Senate version. The Committee of Conference recommended the Senate version. *See* Conference Report, S. Rep. No. 92-681, 92d Cong., 2nd Sess., 15 (1972); H.R. Rep. No. 92-899, 92d Cong., 2nd Sess. 15 (1972).

of employment discrimination in governmental agencies, particularly those involving law enforcement. According to the House of Representatives Report:

> "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, *law enforcement,* and the *administration of justice*) with the result that the credibility of the government's claim to represent all the people equally is negated.
>
> "This widespread discrimination is evidence that State and local governmental units have not instituted equal employment opportunity required by the national policy to eliminate discrimination in employment." (H.R. Rep. No. 92-238, 92d. Cong., 1st Sess. 17 (1971)(emphasis added)).

See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971). Similar remarks were made on the floor of the Senate. For example, Senator Javits observed:

> "The employment discrimination problem is especially acute in areas where there is heavy minority population. This goes for law enforcement, for education, and for the administration of justice. . . [w]hen the special nature of the state and local governmental activity involved is considered, the case for ending this kind of discrimination is even stronger" (118 Cong. Rec. 581 (1972)).[29]

The legislative history of the Equal Employment Opportunity Act of 1972 has been recognized repeatedly as reflecting endorsement of race-conscious remedies.[30] This history is hardly consistent with any reading of a Congressional intention to bar the voluntary implementation of such programs by governmental agencies. Indeed, Congress intended state

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[29] *See also, e.g.*, 118 Cong. Rec. 3978-79 (1972), (remarks of Sen. Moss); 118 Cong. Rec. 1840 (1972) (remarks of Sen. Cooper); 118 Cong. Rec. 591 (1972) (remarks of Sen. Humphrey).

[30] *See Bakke, supra,* 438 U.S. at 353 n.28 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.); *Teamsters v. United States,* 431 U.S. 324, 391-394 (1977) (Opinion of Marshall & Brennan, JJ.); *see* E.E.O.C. Guidelines on Affirmative Action, 29 C.F.R. § 1608.4.

agencies to "lead the way" in the adoption of such programs.[31]

Still further support for reading Title VII as amended to endorse voluntary affirmative action programs by public as well as by private employers is provided by the construction given the statute by the federal agencies entrusted with its administration.[32] The Guidelines on Affirmative Action issued by the Equal Employment Opportunity Commission, the agency specifically authorized to promulgate such regulations, 42 U.S.C. § 2000e-12, set forth a three-step procedure to be followed by employers "without awaiting litigation or formal government action" 29 C.F.R. § 1608.1(b); *see id.* § 1608.4. These Guidelines apply not only to private employers, but to all other persons subject to Title VII as defined in Section 701(a) of the Act, including governmental agencies. 29 C.F.R. § 1608.1(b). The inclusion of governmental agencies is consistent with the principles developed in both prior and subsequent administrative policy statements, including the Policy Statement on Affirmative Action Programs for State and Local Government Agencies previously adopted by the Equal Employment Opportunity Coordinating Council,[33] the Memorandum on Permissible Goals and Timetables in State and Local Government Employment Practices,[34] and regulations issued by the

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[31] *See* S. Rep. No. 92-415, 92d Cong. 1st Sess. (1971), reprinted in part at 118 Cong. Rec. 1070, 1071 (1972); 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams); 118 Cong. Rec. 1817 (1972); 118 Cong. Rec. 581 (1972) (remarks of Sen. Javits).

[32] Their interpretation is entitled to great judicial deference. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). Compare *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977).

[33] 41 Fed. Reg. 38814 (1976). This policy statement expressed the views of the EEOC, the Department of Justice, the Department of the Treasury, the Department of Labor, the Civil Service Commission, and the Commission on Civil Rights. The Equal Employment Opportunity Coordinating Council was abolished and all of its functions transferred to the EEOC by President Carter's Reorganization Plan No. 1, 43 Fed. Reg. 19807 (1978).

[34] 2 Employment Practices Guide (CCH) ¶3775 (1976). This statement of policy was developed by the EEOC, the Department of Justice, the Civil Service Commission, and the Department of Labor's Office of Federal Contract Compliance. *Id.* at 2096.

Department of the Treasury,[35] and by the Law Enforcement Assistance Administration.[36]

Finally, this Court's rationale in approving voluntary affirmative action by private employers in *Weber* is equally applicable to public employers. The overriding Congressional design behind the 1972 extension of Title VII to public agencies was to eliminate traditional patterns of racial segregation in public service. As in *Weber*, "an interpretation [of Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute and must be rejected." *Weber*, 443 U.S. at 201-02. In public service no less than private employment, voluntary compliance is "the preferred means for achieving" this objective. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Moreover, state agencies, like private employers, are subject to civil liability for violations of Title VII. *Fitzpatrick v. Bitzer*, *supra*. As was true for private employers in *Weber*, *see* 443 U.S. at 209-10 (Blackmun, J., concurring), requiring a public agency to expose itself to liability to minority employees as the price of remedying a pronounced racial imbalance in its work force would deter the adoption of those measures which it is the principal purpose of Title VII to encourage.

C. The Department of Corrections Affirmative Action Plan—Designed Both To Remedy Prior Discrimination And To Advance Other Correctional Objectives—Is Permissible Under *Weber*.

While the trial did not focus upon the overt discrimination which historically permeated the Department of Corrections, there is nonetheless ample evidence that the Department's Affirmative Action Plan was adopted to remedy the discriminatory employment patterns which existed throughout the

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[35] *See* 31 C.F.R. §§ 51.53(d), 51.60(c). The Office of Revenue Sharing, in the Department of the Treasury, enforces the civil rights provisions of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1242.

[36] 28 C.F.R. § 42.203. The LEAA administers federal financial assistance to state and local law enforcement agencies and enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3766(c), and the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5272.

Department when the Plan was adopted. *See* pp. 2-4, *supra*. The Department's analysis of its work force contained within the Affirmative Action Plan reflects a traditional pattern of racial segregation sufficient to justify the adoption of appropriate affirmative action measures under *Weber*. 443 U.S. 193 at 202, 208. This evidence unquestionably constituted *prima facie* proof of prior discriminatory employment practices by the Department of Corrections,[37] and was entirely unrebutted by the Petitioners.

Moreover, as indicated above, prior to the entry of judgment, the Department moved to supplement the record to clarify further the nature of the discriminatory practices that had plagued and continued to affect the Department of Corrections. The disturbing—indeed shocking—evidence which the Department proffered is summarized in Appendix B to this brief. The Superior Court rejected this proffer as irrelevant. Although the Court of Appeal observed that the trial court might properly have excluded the evidence on procedural grounds, it also held that such evidence could be considered should there be further proceedings below. Petn. App. A23. Thus, this case cannot be considered on the plainly incorrect premise suggested by Petitioners, that the Affirmative Action Plan was not adopted to remedy the Department's longstanding discriminatory employment practices.

In reversing the Superior Court, the California Court of Appeal relied on the substantial correctional purposes which are served by the Department's program, and the

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[37] *Teamsters v. United States, supra,* 431 U.S. at 339-40 n.20; *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-08 (1977); *Dothard v. Rawlinson,* 433 U.S. 321, 329-31 (1977); *United States v. City of Miami,* 614 F.2d 1322, 1339 (5th Cir. 1980); *Detroit Police Officers Ass'n v. Young,* 608 F.2d 671, 686 (6th Cir. 1979); *Boston Chapter NAACP, Inc. v. Beecher,* 504 F.2d 1017, 1020 n.5 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975). The trial judge's comments suggesting that no further evidence was necessary to establish prior discrimination (R.T. 344, 380, 426-27, 661-62, 708, 883) may be taken as tantamount to judicial notice of matters which, particularly in view of the record before Congress cited above and the numerous judicial findings of unlawful discrimination by law enforcement agencies, are appropriate subjects for judicial notice. *United Steelworkers v. Weber, supra,* 443 U.S. at 199 n.1; *Detroit Police Officers Ass'n v. Young, supra,* 608 F.2d at 690-691; *cf. Electrical Workers Local No. 35 v. City of Hartford,* 625 F.2d 416 (2d Cir. 1980).

reasonableness of that program within the standards articulated by this Court. As discussed in Sections III(C) and (D), *infra,* these objectives are indeed proper and compelling, and the Department's program well-tailored to achieve them without trammeling the rights of non-minority employees. Contrary to Petitioners' assertions (Pet. Br. 3, 13, 32), these objectives are not inconsistent with the Department's concurrent objective of eliminating the consequences of prior discriminatory employment practices. Indeed, as noted repeatedly in the 1972 Congressional debates, discrimination by public entities, particularly law enforcement agencies, is "doubly destructive" (*e.g.,* S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971); 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams)), because it adversely affects both the treatment of minority employees and the minority community's perception of the governmental agency. By increasing the representation of minorities and women at all levels and at all penal institutions throughout the Department, the Plan rectifies the prior underutilization and mistreatment of minority and women officers, and in doing so, thereby enhances the Department's performance of its correctional mission. *See* pp. 43-50, *infra.*

No question concerning the significance of expressing the Plan's goals as percentages of the inmate population, or of the necessity for doing so, was explored by either the parties or the courts in the proceedings below, so that examination of this single feature of the Plan by this Court at this time would be inappropriate. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *Crowell v. Randell,* 10 Pet. 368, 391 (1836); *cf. Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 271 (1977). Moreover, since the record does not disclose whether, over the life of the Plan, the promotion rate of minorities has exceeded the proportion of minorities in the Department—the relevant labor force of applicants for promotion[38]— it is entirely conjectural whether expression of the

[38] The focus of attention throughout has been upon promotion, the only matter of direct interest to Petitioners, who already hold or represent individuals who hold positions in the Department. The Court of Appeal found that the evidence did not support a finding of discrimination in hiring (Petn. App. A17), and Petitioners' Brief refers to no such evidence.

program's goals in terms of the inmate population rather than of the labor market has made or ever will make any difference to anyone. This is especially true since, as the Court of Appeal found, the Plan's percentages are not fixed quotas, but merely non-mandatory goals for evaluating program performance.

However, if this Court should consider the issue, the expression of the Department's goals as percentages of the service population would render the program no less acceptable under Title VII. The high percentage of minority inmates, and the objectives discussed at pages 43-50, *infra*, to which the Department's goals are responsive, are themselves very much the product of the broader societal mistreatment of those racial minorities which the Civil Rights Act of 1964 was designed to redress. Since the legislative history of the 1972 amendments reflects a strong Congressional purpose to improve effective law enforcement among minorities (*see* pp. 21-24, *supra*), to the extent the Department of Corrections program considers race for this very purpose, it hardly runs afoul of the restrictions of Title VII. As four Justices of this Court pointed out in *Bakke:*

> "Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination *or other compelling ends.*" (438 U.S. at 340 n.17 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.) (emphasis added)).

Cf. *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 716 n.30 (1978).

Furthermore, the language of Sections 703(a) and 703(b), 42 U.S.C. §§ 2000e-2(a) and (b), must be read to prohibit only the invidious forms of racial discrimination which the statute was designed to remedy. *United Steelworkers v. Weber, supra; Bakke,* 438 U.S. at 284-287 (Opinion of Powell, J.); *id.* at 337-340 (Opinion of Brennan, White, Marshall, & Blackmun, JJ.); *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 800-01 (1973); *Griggs v. Duke Power Co., supra,* 401 U.S. 424,

429-30 (1971). Employment goals designed to improve prison security, enhance inmate rehabilitation, and counteract racial prejudice among white officers against minority inmates and fellow officers (see pp. 43-50, *infra*) stigmatize no one, because they are not drawn on the presumption that one race is inferior to another and they do not put the weight of government behind racial hatred and separatism. *Bakke, supra,* 438 U.S. at 357-58, 366. *Cf. Johnson* v. *Board of Education,* 604 F.2d 504, 516 (7th Cir. 1979), *cert. granted,* —U.S.—, 48 U.S.L.W. 3852 (July 2, 1980); *Parent Ass'n. of Andrew Jackson High School* v. *Ambach,* 598 F.2d 705, 719-20 (2d Cir. 1979); *Otero* v. *New York City Housing Auth.,* 484 F.2d 1122, 1132-37 (2d Cir. 1973); *King* v. *Harris,* 464 F. Supp. 827, 837 (E.D.N.Y.), *aff'd* 614 F.2d 1288 (2d Cir. 1979). Accordingly, they cannot be regarded as "discrimination" proscribed by Title VII. *Id.* at 340 n.17; *Bakke v. Regents of the University of California, supra,* 18 Cal. 3d at 67-68; *see Fullilove v. Klutznick,* —U.S.—, 48 U.S.L.W. at 4998 (Opinion of Marshall, J. with Brennan & Blackmun, JJ.); Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism,* 14 Harv. C.R.—C.L. L. Rev. 133, 156-163 (1979).

Even if the language of Sections 703(a) and (b), read literally, were deemed to proscribe the Department's program to the extent that it strives for a racial balancing of correctional officers and inmates, the statutory language should still be subject to an implied defense for compelling reasons of public policy consistent with the basic purpose of the statute.[39] *See generally,* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination,* 71

[39] The Department does not rely upon the bona fide occupational qualification ("bfoq") exception contained in Section 703(a), 42 U.S.C. § 2000e-2(e). Under the bfoq exception, *all* persons of a particular religion, sex or national origin may be excluded from consideration in connection with an employment decision based upon a determination that *no* members of that class are likely to be qualified for the position. *See, e.g., Dothard v. Rawlinson, supra,* 433 U.S. at 333-36; *Usery v. Tamiami Tours, Inc.,* 531 F.2d 224, 236 (5th Cir. 1976); *Diaz v. Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971); *Weeks v. Southern Bell Telephone and Telegraph Co.,* 408 F.2d 228, 235 (5th Cir. 1969). No such class exclusion may be made on racial grounds, and the Department's Affirmative Action Plan does not do so.

Mich. L. Rev. 59, 81-89 (1972); Annot. 36 A.L.R. Fed. 9 (1978). An employer may defend against a *prima facie* showing of racially disparate treatment by showing a "legitimate, nondiscriminatory reason" for an employment decision. *McDonnell Douglas Corp.* v. *Green, supra,* at 802. And, although the statute contains no such explicit exception, an employer may defend against a *prima facie* showing that employment practices have a discriminatory impact by showing the job-relatedness of those practices. "Title VII prohibits practices, procedures, or policies which have an adverse impact *unless they are justified by business necessity.*" 29 C.F.R. § 1608.3 (emphasis supplied). *See also Griggs v. Duke Power Co., supra,* 401 U.S. at 431. While this Court has not had occasion to apply such an exception to practices involving explicit consideration of race, as opposed to practices facially neutral but adversely affecting certain racial groups, there is no reason why such an exception should not be equally available in such situations. *See Miller v. Texas State Board of Barber Examiners,* 615 F.2d 650, 653-654 (5th Cir.), *cert. denied* 49 U.S.L.W. 3231 (Oct. 7, 1980). Provided that application of the exception is circumscribed by stringent standards to ensure that it is not misused,[40] compelling public safety objectives may on

[40] In *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971), the Fourth Circuit suggested a standard to govern the applicability of the business necessity defense, similar to that which has been applied to the Equal Protection Clause:

> "Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." [footnotes omitted]

United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd,* 434 U.S. 1026 (1978), suggests an alternative standard of "whether there is available to the employer an alternative practice that would achieve his business purpose equally well but with a lesser disparate impact by race. In examining alternatives, the risk and cost to the employer are relevant." *Id.* at 1115.

relatively rare occasions render essential the express consideration of racial factors just as business necessity may justify consideration of neutral factors which have a racially disproportionate impact. Failure to recognize the exception in such situations would create anomalies that Congress certainly did not intend by the enactment of Title VII. *See Miller v. Texas Barber Examiners, supra.*

This Court's recent decision in *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979), holding that the refusal of the New York City Transit Authority to employ present or former methadone users did not violate Title VII, is predicated on an acknowledgement of the legitimacy of "safety and efficiency" as employment goals; the decision recognizes that rules which bear a "manifest relationship to" such goals do not violate Title VII despite their differential impact on minority races. 440 U.S. at 587 n.31. *See, e.g., Spurlock v. United Airlines, Inc.,* 475 F.2d 216 (10th Cir. 1972). The extraordinary public safety concerns addressed by the California Department of Corrections program are certainly no less compelling. *See* pp. 43-50, *infra.* The Plan's employment goals therefore must be held to pass muster under Title VII.[41]

Because no consideration was given by the California courts to the permissibility of the inmate-related ratios under Title VII, as suggested above these questions may be inappropriate for present decision. If this Court determines that this issue is necessary to a final determination on the merits, the case should be remanded so that the facts and the law may be developed, in the first instance, in the trial court. *See Time, Inc.*

[41] The cases cited by Petitioners to support the proposition that racial classifications designed to serve the "operational needs" of public employers are never permissible (Pet. Br. 30-31) are all inapposite. In most of the cases, the rationale was proffered to justify continued racial segregation of school children. *United States v. Scotland Neck City Bd. of Educ.,* 407 U.S. 484 (1972); *Cooper v. Aaron,* 358 U.S. 1 (1958); *Monroe v. Bd. of Comm'rs,* 391 U.S. 450 (1968); *Brown v. Bd. of Educ.,* 349 U.S. 294 (1955); *Cf. Smith v. Bd. of Educ.,* 365 F.2d 770 (8th Cir. 1966). Here, of course, the Department's goal is not continued segregation but increased integration. *See Johnson v. Bd. of Educ., supra.* As to *Lee v. Washington,* 390 U.S. 333 (1968), *see* pp. 47-48, *infra.* In *Baker v. City of St. Petersburg,* 400 F.2d 294 (5th Cir. 1968), the Fifth Circuit refused to sanction "the blanket assignment of *all* Negroes and *only* Negroes to patrol Zone 13", but explicitly did "not hold that the assignment of a Negro officer to a particular task because he is a Negro can never be justified." *Id.* at 300, 301 (emphasis in original).

v. Firestone, 424 U.S. 448, 463-64 (1976); *Mitchell v. Board of Trustees of Pickens County School Dist.,* 599 F.2d 582 (4th Cir.), *cert. denied,* 444 U.S. 965 (1979). Even if the Court should decide to pass on the question at this time and concludes that these goals are invalid under Title VII, such a conclusion would not invalidate the Department's program as a whole. At most, this conclusion would justify remand for the limited purpose of directing the modification of this single provision of the Affirmative Action Plan by restating the goals with reference to the relevant labor force.

III.

THE FOURTEENTH AMENDMENT DOES NOT BAR CONSIDERATION OF RACE IN CONNECTION WITH THE DEPARTMENT OF CORRECTIONS AFFIRMATIVE ACTION PLAN.

Petitioners' primary claim is based not on Title VII, but on the Equal Protection Clause. Petitioners no longer assert, as they did in the trial court (C.T. 207-11), that consideration of race or sex by a state agency is *per se* unconstitutional, a position foreclosed by numerous decisions of this Court.[42] Instead, they contend that the Affirmative Action Plan does not survive "strict scrutiny" under the Fourteenth Amendment because the Department has failed to show that the Plan furthers a compelling state interest. Pet. Br. 27-35. Petitioners also contend that the Plan is not narrowly tailored to achieve its intended result and that other, non-race-conscious means would achieve the same goals. *Id.* 36-42.

At the outset, we recognize that the Court has not definitively settled the appropriate level of constitutional scrutiny for passing judgment on affirmative action plans. The issue has engendered considerable scholarly[43] as well as judicial

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[42] E.g., *Fullilove v. Klutznick,* —U.S.—, 48 U.S.L.W. 4979 (July 2, 1980) (hereafter *"Fullilove"*); *Bakke, supra; United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144 (1977); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 19-20 (1971).

[43] For articles appearing prior to this Court's *Bakke* decision, *see Bakke,* 438 U.S. at 288 n.25. *See also, e.g.,* Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine,* 14 Harv. C.R.—C.L. L. Rev. 7 (1979); Note,

(footnote continued)

commentary, but we shall eschew it here. In this case, as in *Fullilove,* the Department's program "survive[s] judicial review under either 'test' articulated in the several *Bakke* opinions." 48 U.S.L.W. at 4991 (Opinion of Burger, C.J.)[44]

A. Remedying the Effects of Identified Prior Discrimination Is a Compelling State Interest.

California's compelling interest in "ameliorating the disabling effects of identified discrimination" (*Fullilove, supra,* at 4992 (Powell, J. concurring)) can scarcely be overstated. "The line of school segregation cases, commencing with *Brown,* attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its

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(footnote continued)
Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration, 93 Harv. L. Rev. 938, 949-52 (1980); Wright, *Color-Blind Theories and Color-Conscious Remedies,* 47 U. Chi. L. Rev. 213 (1980).

[44] If, as urged in the remainder of this portion of the brief, the Department's Affirmative Action Plan satisfies the "strict scrutiny compelling state interest" test advanced by Justice Powell in his opinions in *Bakke* and *Fullilove,* it follows *a fortiori* that the plan also passes constitutional muster under the analysis adopted by Justices Brennan, White, Marshall and Blackmun. *See Bakke,* 438 U.S. at 326 n.1. Under that analysis, "the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove,* 48 U.S.L.W. at 4998 (Marshall, J. joined by Brennan and Blackmun, JJ., concurring).

To the extent that this intermediate standard of review incorporates elements which are not also subsumed within the compelling state interest standard (*see Bakke,* 438 U.S. at 361), these requirements are also met here. The Department's Affirmative Action Plan does not operate to "stigmatize[ ] any discrete group . . . ." *Id.* at 373. Non-minority males who are not hired or who fail to receive a particular promotion are not "in any sense stamped as inferior," nor is there "a significant likelihood that they will be treated as second-class citizens because of their color" throughout their lives. *Bakke,* 435 U.S. at 375. The program does not stigmatize as inferior its beneficiaries because of the Department's adherence to promoting only the most qualified applicants. *Compare Bakke,* 438 U.S. at 375-376 and *Fullilove,* 48 U.S.L.W. at 4999. Since the marginal impact of the Plan on non-beneficiaries falls equally upon a large number of diverse individuals, the Plan hardly "singles out those least well represented in the political process to bear the brunt of a benign program." *Bakke,* 438 U.S. at 361; *Fullilove,* 48 U.S.L.W. at 4999. The fact that over 70% of all promotions continue to go to non-minorities (C.T. 563) confirms that the Department's Plan does not unduly penalize any individuals or groups.

attainment." *Bakke,* 438 U.S. at 307 (Powell, J.). As the Chief Justice noted in *Fullilove,* achieving "equality of economic opportunity" is a "constitutional mandate." 48 U.S.L.W. at 4990. Even Petitioners acknowledge that "remedying established past discrimination may be a compelling state interest sufficient to justify the limited use of racial classifications by a public entity." Pet. Br. 31.

The Affirmative Action Plan adopted by the Department of Corrections grew out of a pattern of historical underrepresentation of minorities comparable to the backdrop against which the statute upheld in *Fullilove* was enacted. *Compare* 48 U.S.L.W. at 4982-86 with pp. 2-4, *supra.* This underrepresentation was the result of prior discriminatory practices within the Department. *See* pp. 26-27, *supra.* Petitioners contend that this evidence is constitutionally insufficient to sustain the plan because "the Fourteenth Amendment has consistently been held to require prior *intentional* discrimination to justify imposition of racial classifications" (Pet. Br. 34 (emphasis in original)). This argument apparently is based on the unarticulated premises that the use of race-conscious remedial measures is permissible only to remedy prior illegal discrimination; that Title VII did not apply to the Department until 1972; that, prior to that year, state agencies violated the law only if they engaged in the intentional discrimination proscribed by the Fourteenth Amendment under *Washington v. Davis,* 426 U.S. 229 (1976), and that the Department's discrimination prior to 1972 was unintentional.

This argument is meritless for several reasons. First, its factual assumption concerning the nature of the past discrimination within the Department is neither consistent with the record (*see* pp. 2-4, *supra;* Appendix B infra) nor supported by any findings of the trial court. *See* n. 17, *supra.* Second, it is not the law that only prior discrimination which was illegal at the time of its commission may be voluntarily remedied. To the contrary, *Fullilove* indicates that prior discrimination need not be illegal in order to be correctible. *Cf. United Steelworkers v. Weber, supra.* The Chief Justice's opinion in that case upheld the legality of the 10% set-aside without ever inquiring whether the prior discrimination on the part of federal grantees which the set-aside was designed to counter violated applicable law.

Nor did Justice Marshall's opinion propose such an inquiry. And while Justice Powell found that "purposeful discrimination [had] contributed significantly to the small percentage of federal contracting funds that minority business enterprises [had] received" (*id.* at 4995), the report on which he based that conclusion in fact found a mix of both overt and facially neutral discrimination, the latter of which would not have been illegal under the statutes and constitutional provisions cited by Justice Powell.[45] The urgency of remedying prior discrimination simply does not depend on whether that discrimination was illegal at the time of its commission.

Third, even if Respondents were required to show that the acts sought to be remedied constituted violations of law, Petitioners' argument overlooks the fact that California has since at least 1959 prohibited both intentional and unintentional racial discrimination in the state civil service. Section 19702 of the California Government Code, enacted in 1945, provides in relevant part that "[a] person shall not be discriminated against under . . . [the state civil service law] because of . . . race . . . ." This statute has never been construed by the California courts to bar only intentional discrimination.[46] Moreover, Section 1420(a) of the California

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[45] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the Fourteenth Amendment—each cited by Justice Powell—bar only intentional discrimination. As to 42 U.S.C. § 1981, *see Guardians Ass'n. v. Civil Serv. Comm'n*, —F.2d—, 23 EPD ¶ 31,153 (2d Cir. 1980); *Mescall v. Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978); and *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *but see Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); and *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838 n.22 (D.C. Cir. 1977) (dictum). As to Title VI, a majority of this Court held in *Bakke* that it "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke, supra*, at 287 (Powell, J.); *see also id.* at 328-55 (Opinion of Brennan, White, Marshall & Blackmun, JJ).

[46] This section has been cited by the California Court of Appeal as authority for an affirmative action plan similar to that at issue here. *Dawn v. State Personnel Bd.*, 91 Cal. App. 3d 588, 593 (1979). The Assistant Executive Officer of the California State Personnel Board reported to the Assembly Committee on Public Employees and Retirement that the *Griggs*

(footnote continued)

Labor Code, part of the California Fair Employment Act (FEPA), since 1959 has prohibited employers, including the state (§1413(d)), from "discriminat[ing] . . . in compensation or in terms, conditions or privileges of employment" because of race, and the California courts have held that discriminatory intent need not be shown to establish a violation of that section. *Northern Inyo Hospital v. Fair Employment Practice Commission,* 38 Cal. App. 3d 14, 25 (1974). Whether the discrimination practiced against minority employees of the Department prior to 1972 was intentional or not, it was a violation of California law and thus constitutionally remediable under any of the theories enunciated in *Bakke* and *Fullilove.*

B. The Department Was Authorized To Adopt Its Affirmative Action Plan To Remedy the Effects of Identified Prior Discrimination Found To Exist by the California Legislature, Congress and the Department.

In his opinions in *Bakke* and *Fullilove,* Justice Powell has taken the position that "the legitimate interest in creating a race conscious remedy is not compelling unless an appropriate governmental authority has found that [a constitutional or statutory violation] has occurred." *Fullilove, supra,* 48 U.S.L.W. at 4992-93 (Powell, J., concurring); *Bakke, supra,* 438 U.S. at 307-09 (Opinion of Powell, J.). This standard presents no difficulty here since the California Department of Corrections has specifically been authorized—indeed, compelled—to adopt an affirmative action plan in response to the underutilization of minorities within its work force. Its Plan is supported by findings by the California Legislature, by Congress, and by the Department of Corrections itself.

In the Spring of 1971, the California Assembly Committee on Employment and Public Employees held two days of

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(footnote continued)
case and the Equal Employment Opportunity Act of 1972 had not had a great impact on California, because state law "long had specific provisions requiring nondiscrimination in hiring and the use of job-related selection procedures," citing Cal. Gov't Code §§ 18930 and 19702. Letter of January 21, 1976 from Burton W. Oliver to the Honorable Wadie Deddeh, Attachment "A" at 2; *see also* State Personnel Board Bill Analysis of AB 674 (1972).

hearings on racial discrimination in the state civil service.[47] This Court had recently decided *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and much of the testimony focused on the adverse impact which the State's job qualification and examination process had on minorities.[48] During these hearings, both legislators and witnesses commented on the low percentage of minorities in the Department of Corrections.[49]

Following the hearings, the Assembly Committee issued a "July, 1971 Report on California As An Equal Opportunity Employer." (hereafter "Committee Report") Under the heading, "Need for Affirmative Action", the Committee stated:

> "The Committee concludes that the mere prohibition of discriminatory practices is not enough to effectuate

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[47] Copies of the California legislative materials cited in the following pages have been lodged with the Clerk and furnished to Petitioners. Judicial notice of these materials unquestionably is proper. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977); *Shapiro v. United States*, 335 U.S. 1, 14 n.19 (1948); *Preisler v. Secretary of State*, 257 F. Supp. 953, 960-66 (W.D. Mo. 1966), *aff'd*, 385 U.S. 450 (1967); *see also Fullilove*, 48 U.S.L.W. at 4981-84 (Opinion of Burger, C.J.); *id.* at 4994-95 (Opinion of Powell, J.); *Zablocki v. Redhail*, 434 U.S. 374, 388 and nn.13-15 (1978).

[48] For example, William Burns, Chairman of the Technical Advisory Committee on Testing to the California Fair Employment Practices Commission, testified that the civil service examinations used by the State Personnel Board would be unacceptable under the *Griggs* decision because there was "very little, if any, evidence indicating that their tests are related to the job." Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Charges of Discrimination in State Hiring Practices (May 12, 1971) (hereafter "May, 1971 Transcript") at 17. He also stated that the "Rule of Three" (under which a state agency hires from the three highest scoring applicants on a particular test) discriminated against minorities. *Id.* at 12-13. Other testimony concerned civil service job qualifications which, like the high school diploma requirement in *Griggs*, had an adverse impact on minorities and were not job-related. *Id.* at 10; Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Charges of Discrimination in State Hiring Practices (April 28, 1971) (hereafter "April, 1971 Transcript") at 24. Testimony also established that the adverse impact which the State's facially neutral civil service policies had on minorities was the result of prior discrimination. May 1971 Transcript at 6.

[49] April, 1971 Transcript at 12. In the course of reviewing the recruitment process for correctional officers, Assemblyman Ketchum stated that the possibility of bias in the oral examination process was "part of this whole discrimination problem." *Id.* at 14-15. Another witness testified that the lack of Mexican-American prison superintendents resulted from discrimination in the Department of Corrections. *Id.* at 87.

> the principle of equal opportunity in state employment. An affirmative action program is needed to achieve this goal." (*Id.* at 10).[50]

On September 23, 1971, Governor Reagan issued Executive Order No. R-34-71, which redefined the "California Code of Fair Practices." The Executive Order stated that "[t]ime and experience have shown that laws and edicts of nondiscrimination are not enough" to achieve equal opportunity; thus, "a personal commitment to affirmative action" on the part of each citizen was required. The Code of Fair Practices promulgated with the Executive Order required each state agency to promulgate "clear, written directives to . . . guarantee equal employment opportunities at all levels of state government." *Id.* California Code of Fair Practices at 2. The Executive Order also required the State Personnel Board to "take positive steps to insure that the entire civil service process is free from conscious, unconscious, or inadvertent bias of any kind." *Id.*

On February 1, 1974, Governor Reagan issued a memorandum to the heads of all California agencies and departments concerning the "State Equal Employment Opportunity Program." Ex. G at 48. The memorandum announced that the State Personnel Board had "accepted the leadership responsibility" in the State's affirmative action efforts and required each state agency and department to "develop and submit to the [State]Personnel Board written equal employment opportunity policies and an affirmative action plan by July 1, 1974 . . . ." *Id.* The Legislature indicated its approval of the Governor's order when it enacted Government Code § 19702.5, Stats. 1974, ch. 1395, requiring the State Personnel Board to provide the Fair Employment Practices Commission with a copy of each

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[50] The Committee's report also contained several recommendations for administrative action by the State Personnel Board, all of which were later incorporated in a resolution passed by the California Legislature. Assembly Concurrent Resolution No. 157. Among other things, the Resolution required the State Personnel Board to review its examination procedures in accordance with *Griggs* (¶2) and to seek out members of minority groups to serve as raters on oral interview panels to guard against the possibility of racial bias in oral examinations. *Id.* ¶ 5. In 1972, the state Civil Service Act was amended by including the specific requirement that hiring and promotion conform to the federal Civil Rights Act of 1964, Cal. Gov't. Code §19702.1, and, in effect, to the teaching of this Court in *Griggs*. *Id.* § 19702.2.

affirmative action plan submitted by a state agency. The Department of Corrections' Plan was promulgated on July 1, 1974, in compliance with Governor Reagan's directive.

The statewide commitment to affirmative action, which prompted the initial adoption of the Department's Affirmative Action Plan in 1974, was reconfirmed prior to the extension of the Department's Plan in 1979. In 1977, the California Legislature adopted a "State Civil Service Affirmative Action Program." Stats. 1977, ch. 943, Cal. Gov't. Code §§ 19790-97. In enacting this statute, the Legislature declared:

> "[b]eyond assurances of nondiscrimination, it is the policy of the State of California to have each state hiring unit initiate comprehensive written affirmative action programs which will take steps to remedy any disparate staffing and recruitment patterns." Stats. 1977, ch. 943 § 1(c).

Section 19790 provides that "each agency and department is responsible for establishing an affirmative action program" and directs that "each agency and department shall establish goals and timetables designed to overcome any identified under-utilization of minorities and women in their respective organizations." These provisions unquestionably reflect the public policy of the State of California. *Price v. Civil Service Commission,* 26 Cal. 3d 257, 276, 277, *petition dismissed as moot,* —U.S.—, 49 U.S.L.W. 3244 (Oct. 6, 1980).[51]

Thus, by the time it enacted Government Code Sections 19790-97, the Legislature had considered evidence reflecting the underutilization of minorities in the State work force,[52] and

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[51] In this injunctive action, the Court must take the law as it now is, not as it was when the action was commenced. *Bradley v. School Bd.*, 416 U.S. 696 (1974). Moreover, when the Assembly considered the bill which enacted Government Code Sections 19790-97 (AB 1350), it was told that the bill "would simply codify present state affirmative action procedures." Legislative Analyst's Analysis of Assembly Bill No. 1350 at 2.

[52] In its 1971 hearings, the Assembly Committee on Employment and Public Employees had discussed a 1969 Report to the Governor giving an ethnic breakdown of the state's work force. *See* Committee Report at 6. The Legislature later passed Assembly Concurrent Resolution No. 157 which, *inter alia,* required the State Personnel Board to "establish a permanent ethnic data reporting system to provide the Legislature with a periodic review of the number of blacks, Mexican-Americans and other minorities in the employ of the State of California." *Id.* ¶ 1. Commencing in 1973, the State Personnel Board has annually provided this information to the Legislature.

showing that this underutilization was due to prior discrimination.[53] In requiring each state agency to undertake affirmative action efforts to remedy any underutilization of minorities within its work force, the Legislature concluded that any such underrepresentation was the result of "disparate staffing and recruitment patterns" (Stats. 1977, Chap. 943, § 1(c)) which had discriminated against minorities. *See also* Cal. Gov't Code §19793. Like the Congress which passed the MBE set-aside, the Legislature concluded that more positive steps than merely proscribing discrimination were required to rectify the effects of such discrimination.[54]

The California Legislature is not the only legislative body which has recognized the existence of racial discrimination in state employment. The Congress—which is "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees" (*Fullilove, supra,* 48 U.S.L.W. at 4989 (Opinion of Burger, C.J.))—explicitly found such discrimination to exist when it amended Title VII in 1972 to proscribe discrimination in state and local employment (*see* pp. 21-24, *supra*), and reconfirmed that determination when it

[53] In 1974 and 1975, the Assembly Committee on Employment and Public Employees held hearings relating to discrimination in the state civil service similar to its 1971 hearings. At the outset of the 1974 hearings, the Chairman of the Committee, Assemblyman Deddeh, explicitly linked affirmative action with the need to remedy prior discrimination, by both society-at-large and the State as an employer. Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Equal Employment Opportunity in State Service (September 12, 1974) at 2-3. In connection with the 1975 hearings, the State Personnel Board submitted a "Supplemental Report" which advised the Committee that discriminatory practices were still "deeply imbedded" in the State's employment structure. State Personnel Board, Supplemental Report to Assembly Committee on Public Employees and Retirement at 1 (December 4, 1975). The Supplemental Report also stated that "the State of California has, as the major focus of its equal employment efforts, affirmative actions beyond neutral "nondiscriminatory" and "merit-hiring" policies." *Id.*

[54] There can be no doubt that the Legislature was fully competent both to find that minorities were underrepresented in the state civil service as a result of the agencies' prior discriminatory practices and to authorize state agencies to take effective steps to remedy this disparity. Unlike the Congress, which has only such authority as may be granted by the Constitution, the California Legislature may "exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the constitution." *Methodist Hosp. v. Saylor,* 5 Cal. 3d 685, 691 (1971).

adopted the Crime Control Act of 1973, 87 Stat. 197, and the Crime Control Act of 1976, 90 Stat. 2407, 42 U.S.C. § 3766(c); *see* 119 Cong. Rec. 20070 (1973) (remarks of Rep. Jordan); 122 Cong. Rec. 34118 (1976) (remarks of Rep. Conyers). [55]

In addition to the findings by Congress and the California Legislature, the Department of course was aware of its own prior discriminatory practices when it adopted its Affirmative Action Plan.[56] The breakdown of the Department's work force by ethnicity and gender contained in the Plan, Ex. G at 25-39, "disclosed appreciable imbalances in the ethnic and sex distributions of the California Department of Corrections personnel." *Id.* at 24. And the Department's top administrators had personal knowledge that this imbalance was due to prior discrimination. *See, e.g.*, R.T. 338, 707-08. Nothing in Justice Powell's Opinion in *Bakke* can fairly be read to impair the ability of a responsible public agency to conclude, on the basis of its own self-examination, that it has been guilty of prior discrimination. Indeed, in that case it was conceded that the University had not itself discriminated. *Bakke,* 438 U.S. at 296 n.36. When an agency turns its scrutiny inward and concludes that its own practices have had the intended or unintended result of discriminating against minority groups, the amorphous quality of the inquiry into "societal discrimination" that troubled Justice Powell in *Bakke* completely disappears.

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[55] Of course Congress made no specific findings concerning the California civil service in general or the Department of Corrections in particular. Of necessity, Congress usually acts on a national level, not on a case-by-case basis. *See Oregon v. Mitchell,* 400 U.S. 112, 284 (1970) (Stewart, J., concurring and dissenting). The absence of specific Congressional findings relating to California is as constitutionally irrelevant in this case as the absence of Congressional findings that discrimination in federal contracting had occurred in the New York area (the geographical location of the *Fullilove* plaintiffs) was in that case. *See Fullilove,* 48 U.S.L.W. at 4989; *United States v. City of Miami, supra,* 614 F.2d at 1337-38.

[56] Under California law, the Department of Corrections is the agency entrusted with authority to administer state prisons. *See* California Penal Code §§ 5002, 5054; 15 Cal. Adm. Code §§ 3000, et seq.; *People v. Horton,* 264 Cal. App. 2d 192 (1968). These general provisions in and of themselves may well constitute a sufficient delegation of authority to the Department to determine the need for and to adopt a remedial affirmative action program. *See Sweezy v. New Hampshire,* 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring); *National League of Cities v. Usery,* 426 U.S. 833 (1976); Sedler, *supra,* 14 Harv. C.R.—C.L. L. Rev. at 168.

In all events, here the Department's knowledge of its own prior practices does not stand alone. The adoption of the Affirmative Action Plan was premised not only on self-review, but also on the Governor's command that an affirmative action program be promulgated and Congressional findings that "widespread discrimination" against minorities in state employment existed throughout the nation. By the time a successor plan was adopted in 1979, the gubernatorial command had been reinforced by a further legislative mandate, accompanied by legislative findings of prior discrimination in the state civil service. The Department's adoption and retention of its Affirmative Action Plan is thus supported by constitutionally sufficient authorization and findings.

C. The Department's Affirmative Action Plan Furthers the State's Compelling Interests in Promoting Prison Security and Fostering Inmate Rehabilitation.

Because of social problems deeply ingrained in our society, racial and ethnic minorities are significantly overrepresented among the inmate population. While approximately half of the inmates within California's penal institutions are black or Mexican-American, historically the prison staff has been almost exclusively white male. *See* pp. 4-5, *supra*.[57]

Within the prison population, deep-seated racial hostility is a sad reality with which prison administrators must contend on a daily basis. The testimony at trial established—and Petitioners admit—that California's prisons are "plagued by racial gangs." Pet. Br. 26; *see also* R.T. 340-41, 476, 560, 627, 899; C.T. 525, 561. Many inmates in California's prison system are "intensely conscious of race" and "potentially violent and assaultive." C.T. 510. Many "have never had a satisfactory relationship with anyone of another race. The only contact which many minority inmates have had with white persons has

[57] This situation is not peculiar to California, but exists in most other states. "For too long, minority groups have been overrepresented as offenders and underrepresented as staff. Affirmative action is required to alter the situation created by years of discrimination and indifference." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 599 (1973). *See also, e.g.*, U.S. Commission on Civil Rights, *Civil Rights* 121 (1963); New York State Special Commission on Attica, *Attica: The Official Report*, 106-107 (1972) (hereafter *"Attica Report"*).

been with authority figures and these experiences have generally been unfortunate for the inmate." C.T. 501. Until the adoption of the affirmative action program, "the resentment of minority inmates against white authority figures was further reinforced by a prison situation where the overwhelming majority of correctional officers was white." *Id.*

Because of these attitudes, the specter of racial violence is ever-present in California's prisons. *E.g.*, R.T. 548-64, 896-99; C.T. 494-96, 501, 560-61. The existence of racial hostility within the prisons has been confirmed by academic studies,[58] the writing of minority inmates,[59] prison disturbances in California's prisons and elsewhere,[60] and numerous California

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[58] *Attica Report* 39-40, 79-82, 106-07; Carroll, *Hacks, Blacks and Cons* 91-113, 187, 188 (1974). According to this study:

> "In brief, the white custodians regard the black inmates with a mixture of hostility and fear derived from several sources. As members of the white middle class, they share many of the traditional stereotypes of blacks and see their status threatened by the current wave of black militancy. As correctional officers in a reform-oriented institution, many of their powers and much of their status had been eroded, and this threat—coincident during the latter part of the study period with incidents such as the Attica tragedy—is interpreted to a large extent in racial terms. Thus, on the one hand, the officers see the black prisoners as lazy, ignorant, crude and hypersexual; on the other hand, they view them as dangerous, conspiring revolutionaries whose intentions are not only to challenge the authority of the custodians but quite possibly to seek control of the institution by means of open rebellion.
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> "Such conceptions differ markedly from those the custodians have of the white inmates . . ." (*Id.* at 126-27).

See also, e.g., Denfeld & Hopkins, *Racial-Ethnic Identification in Prison: 'Right On from the Inside,'* 3 Int. J. Criminology & Penology 355, 363-65 (1975); Jacobs, *Stratification and Conflict Among Prison Inmates*, 66 J. Crim. L. & Criminology 476 (1975); Burdman, *Ethnic Self-Help Groups in Prison and On Parole*, 20 Crime & Delinquency 107, 116-117 (1974); Wilbanks, *The Report of the Commission on Attica*, 37 Fed. Probation 3, 4-5 (March 1973).

[59] *See, e.g.*, Malcolm X and Alex Haley, *Autobiography of Malcolm X* (1964); Cleaver, *Soul on Ice* (1968); Jackson, *Soledad Brother: The Prison Letters of George Jackson* (1970).

[60] *See e.g.*, Serrill, *Profile California*, 1 Corrections 3, 33 (Sept. 1974); The Task Force to Study Violence, *Report and Recommendations* (1974) (Record, Ex. "C"; not in evidence); *Attica Report*; Fox, *Racial Issues in*

(footnote continued)

appellate cases which describe specific racial incidents.[61] This Court has also recognized the unremitting tension that exists behind prison walls.[62]

There can thus be no doubt of the imperative need to ameliorate these conditions. At stake is not only the orderly and efficient administration of California's correctional system, but the safety of officers, inmates and, on occasion, visitors and other members of the public who may be touched by prison outbursts. Respondents need not denigrate the First Amendment interest in academic diversity found by Justice Powell to be a compelling governmental interest in *Bakke* to state that it scarcely compares, in terms of human life and limb, with the "self-evident" interest in preserving prison order repeatedly recognized by the Court. *Jones v. North Carolina Prisoners' Union, supra,* 433 U.S. at 132 (1977). Petitioners—as prison guards—have a very real and direct stake in preserving prison security; not surprisingly, they advise the Court that they do not "dispute[ ] the interest of the State in reducing racial conflict and violence in its prison system." Pet. Br. 28.

Nor can there be any doubt that increasing the minority composition of the correctional work force at all levels is essential to the accomplishment of this task. There is, in general, greater cultural identification between inmates and officers of the same race, which often enables an inmate to relate more easily to an officer of the same race. R.T. 324-25, 343, 344, 383, 445, 459-61, 620-32, 853, 892-901; C.T. 502, 525-526.[63] There is also a greater ability to communicate—not

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Corrections: Cultured Awareness—How to Achieve It, in Proceedings of the 102nd Annual Congress of Correction of the American Correctional Association 178-80 (1972); Burger, *Our Options are Limited,* 18 *Vill. L. Rev.* 165, 167 (1972).

[61] *See, e.g., People v. Gardner,* 56 Cal. App. 3d 91, 93 (1976); *People v. Hisquierdo,* 45 Cal. App. 3d 397, 405 (1975); *Spain v. Procunier,* 408 F. Supp. 534, 539 (N.D. Cal. 1976), *aff'd in part, rev'd in part,* 600 F.2d 189 (9th Cir. 1979).

[62] *E.g., Jones v. North Carolina Prisoners Union,* 433 U.S. 119, 132 (1977); *Wolff v. McDonnell,* 418 U.S. 539, 562 (1974).

[63] Although Petitioners' witnesses expressed some contrary views (*e.g.,* R.T. 758-59), those witnesses did not, of course, purport to express the reasoning of the Department administration. While the Superior Court

(footnote continued)

only between Spanish speaking Mexican-American officers and inmates, but also between other minority staff and inmates whose "ghettoese" is often unfamiliar to white officers from different backgrounds. R.T. 478-79, 550, 564-65, 591, 654-55, 842, 846-47, 853, 893-99, 903; C.T. 500-02, 525-26. And improved communication is an important start to the elimination of friction and needless confrontations. C.T. 502, 504.

Because of this shared cultural identification, minority inmates often will react to the same treatment from minority officers more favorably than from officers of a different race. R.T. 561, 846-47, 896-97; C.T. 502, 510, 525-26, 541. The presence of minority officers also provides a communication vehicle by which administrators are more certain to be advised of inmate grievances and to become aware of prisoner discontent and impending outbursts. C.T. 496-97, 526.[64] In potentially explosive situations, an officer of the same race may be able to quiet a group of inmates that would react violently if approached by an officer of a different race. R.T. 896-97; C.T. 494-96, 525-26; *see also Lee v. Washington,* 390 U.S. 333, 334 (1968)(concurring opinion); *Baker v. City of St. Petersburg,* 400 F.2d 294, 301 n.10 (5th Cir. 1968). In such situations, the

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rejected as irrelevant numerous findings of fact proposed by both sides concerning the effects on inmates and prison conditions of increasing the number of women and minority officers and supervisors (C.T. 621-23, 646-48, 1080-81; R.T. 1427-33), the court did, in Finding No. 19, find that because of the conditions within California prisons, in making job assignments it is necessary to consider the race and sex of employees "in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." Petn. App. F6.

[64] The Chief Justice has written that "every penal institution" should have a "proper grievance procedure [ ]": a "means of having complaints reach decision making sources through established channels so that valid grievances can be remedied and spurious grievances exposed." Burger, *supra,* at 170 (1972). But unless there are minority correctional officers who are trusted by minority inmates to act fairly with their grievances, the means of communication between inmates and custodians will be blocked. *See* Pepper, *Prisons in Turmoil,* 36 Fed. Probation 3, 4 (December 1972); Joint Commission on Correctional Manpower and Training, *Differences That Make The Difference,* p. 67 (1967); Jacobs & Grear, *Dropouts and Rejects: An Analysis of the Prison Guard's Revolving Door,* 2 Crim. J. Rev. 57 (Fall 1977).

presence or absence of minority officers may have a direct and immediate bearing on whether life is lost or needless bloodshed averted. *See, e.g.,* C.T. 494-96, 504, 525-26, 560-61.

This Court's sensitivity to the special needs of prison administration has led it, on many occasions, to accommodate constitutional guarantees to the "self-evident" interest in preserving order and authority in the prisons.[65] As the Court stated in *Bell v. Wolfish,* 441 U.S. 520 (1979):

> "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee . . . the practice must be evaluated in light of the central objective of prison administration, safeguarding institutional security." (*Id.* at 547).

These cases cannot be distinguished on the ground that they involve merely the constitutional rights of convicted felons, for they also hold that rights of members of the public may be curtailed due to the compelling state interests in maintaining prison order and security. Thus the Court in *Procunier v. Martinez, supra,* after holding that censorship of prison mail restricts First and Fourteenth Amendment rights of those who correspond with prisoners (*id.* at 409), went on to hold that censorship was nonetheless justified if it furthered "one or more of the substantial governmental interests of security, order, and rehabilitation." *Id.* at 413. *See also Pell v. Procunier, supra,* 417 U.S. at 829-835; *Adderley v. Florida, supra,* n.65.

If the rights of persons only tangentially connected to the prison may be curtailed in the interests of orderly prison administration and security, the same is certainly true of prison employees whose occupational duties are intimately related to prison operation. The Fourth Amendment rights of prison employees "may be diluted by the specialized requirements of discipline, safety and security" necessary for operation of a

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[65] *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977); *Procunier v. Martinez,* 416 U.S. 396 (1974); *Pell v. Procunier,* 417 U.S. 817 (1974); *Saxbe v. Washington Post,* 417 U.S. 843 (1974); *Houchins v. KQED,* 438 U.S. 1 (1978); *Adderley v. Florida,* 385 U.S. 39 (1966).

prison. *Gettlemen v. Werner,* 377 F. Supp. 445, 451 (W.D. Pa. 1974); *United States v. Kelley,* 393 F. Supp. 755 (W.D. Okla. 1975). And persons holding analogous government positions, such as policemen, probation officers, or military personnel, may find their rights substantially restricted. *Brown v. Glines,* 444 U.S. 348 (1980); *Kelley v. Johnson,* 425 U.S. 238 (1976); *Parker v. Levy,* 417 U.S. 733, 753-757 (1974).[66]

The compelling state interest in maintaining prison security has led the Court to permit use of racial and sexual criteria in a manner which accommodates the legitimate needs of prison administrators. When the Court banned racial segregation in prisons, it did so only after finding that the District Court's order requiring desegregation made due "allowance for the necessities of prison security and discipline," and three Justices added explicitly in concurrence that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Lee v. Washington, supra,* 390 U.S. at 333, 334 (Black, Harlan, and Stewart, JJ., concurring).[67] *See also Cruz v. Beto,* 405 U.S. 319 (1972) ("racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, *save for 'the necessities of prison security and discipline'.*" *Id.* at 321 (emphasis added)). The "peculiarly inhospitable" environment of Alabama's prisons has been held to justify the refusal of prison administrators to allow women to serve in "contact positions" in all-male maximum-security institutions, despite the fact that the Court simultaneously held the "bona fide occupational qualification" exception to Title VII to be "extremely narrow." *Dothard v. Rawlinson,* 433 U.S. 321, 334, 336 (1977).

There is an additional interest furthered by the Department's Plan which is sufficiently compelling to justify it: inmate

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[66] *See also, e.g., Byrd v. Gain,* 558 F.2d 553 (9th Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978); *Phillips v. Adult Probation Department,* 491 F.2d 951 (9th Cir. 1974).

[67] In *Fullilove,* Justice Powell cited the three-Justice concurrence in *Lee v. Washington* as evidence of the general proposition that "in narrowly defined circumstances, the presumption [that official action based on racial criteria is inherently suspect and invalid] can be rebutted." *Fullilove,* at 4992 (Powell, J., concurring); *see also Bakke,* 438 U.S. at 287 (Powell, J.).

rehabilitation. Such rehabilitation is among the important governmental interests served by the maintenance of penal institutions. *Procunier v. Martinez, supra,* 416 U.S. at 412; *Pell v. Procunier, supra,* 417 U.S. at 823.

The integration of minority members throughout the correctional work force has a direct and salutory effect on prisoner rehabilitation. C.T. 510. Minority officers provide role models with whom minority inmates identify and whose conduct they may seek to emulate. C.T. 504, 526, 542. The presence of minority officers, particularly in positions of supervision and authority, helps demonstrate to minority inmates that those in authority understand their concerns and will treat them fairly.[68]

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[68] "[B]lack inmates will make a better adjustment to prison life and will conform better to prison routine and requirements if they believe affirmatively that members of their race are being treated fairly and without discrimination on account of race." *Holt v. Hutto,* 363 F. Supp. 194, 205 (E.D. Ark. 1973), *aff'd in part and rev'd in part sub. nom. Finney* v. *Ark. Bd. Corr.,* 505 F.2d 194 (8th Cir. 1974). *Compare McClelland v. Sigler,* 327 F. Supp. 829, 831 (D. Neb. 1971), *aff'd,* 456 F.2d 1256 (8th Cir. 1972).

The need for integration at all levels of the correctional hierarchy to prevent racial discrimination against inmates, and the necessity for explicit consideration of race in achieving this goal, are exemplified by the protracted litigation involving the Arkansas Board of Corrections. There the court rejected the contention that racially neutral hiring was an adequate means to alleviate racial discrimination against inmates:

> "This is not a fair employment practices case. The question is not whether the Department is discriminating against blacks in matters of hirings, promotions, or discharges, but whether the recruitment and promotional policies of the Department are designed to correct or alleviate the racial imbalance of the Department's staff which has contributed so much to the difficulties that the Department has had in the area now under consideration.
>
> "What the Department needs to do is not to hire people without regard to race but to make a conscious effort to hire qualified blacks in additional numbers and to place them in positions in the institutions which will enable them to exercise some real authority and influence in the aspects of prison life with which black inmates are primarily concerned.
>
> "The Department needs more blacks who are in positions that will enable them to sit on classification committees and on disciplinary panels, to counsel with inmates about their problems, and to supervise inmates while at work." *Finney v. Hutto,* 410 F. Supp. 251, 267 (E.D. Ark. 1976), *aff'd,* 548 F.2d 740 (8th Cir. 1977), *aff'd,* 437 U.S. 678 (1978).

For these reasons and others,[69] there can be no doubt that several compelling public interests justify the Department's Affirmative Action Plan. "A correctional population where minority groups are highly overrepresented can hardly be well served by a staff that is overwhelmingly white." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections,* 474 (1973).[70] Indeed, it is difficult to imagine a context in which more demanding public objectives might justify such governmental action.[71]

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[69] Increasing the number of minority correctional officers also protects minority inmates against unconstitutional racially discriminatory treatment. C.T. 526-27. *See also Diamond v. Thompson,* 364 F. Supp. 659, 667 n.6 (M.D. Ala. 1973). Prisoners do not shed their right to be free from racial discrimination at the prison gate. *Lee v. Washington, supra; Cruz v. Beto, supra; McClelland v. Sigler, supra; Thomas v. Pate,* 493 F.2d 151 (7th Cir. 1974); *United States v. Wyandotte County,* 480 F.2d 969 (10th Cir.), *cert. denied,* 414 U.S. 1068 (1973); *Holt v. Hutto, supra; Gates v. Collier,* 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974). Discriminatory treatment of minority inmates is a well documented phenomenon in prisons staffed by predominantly white personnel (*e.g., Attica Report,* pp. 39-40; Carroll, *supra,* pp. 116-123, 127-130 (1974); *Gates v. Collier, supra,* 349 F. Supp. at 887; *Holt v. Hutto, supra,* 363 F. Supp. at 204) and, unhappily, California's prisons are no exception. C.T. 501, 526-27.

[70] *See also, e.g.,* Association of State Correctional Administrators, *Uniform Correctional Policies and Procedures,* Racial Issues 23-24 (1972); ABA Commission on Correctional Facilities and Services, *A Correctional Must: Increased Staff Recruitment from Minority Groups* 4-5 (1972); Skoler & Loewenstein, *Minorities in Correction—Nondiscrimination, Equal Opportunity, and Legal Issues,* 20 Crime & Delinquency 339 (1974); Pappas, ed., *The Jail: Its Operation and Management* 125 (1970); Carroll, *supra,* at 124-127; *Attica Report,* pp. 79-82, 106-107; National Conference on Corrections, *We Hold These Truths . . .,* p. 85 (1971).

[71] The objectives to be served in integrating the correctional workforce are not unlike those which numerous courts have recognized in ordering other law enforcement agencies to hire and promote minority officers. *E.g., Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n,* 482 F.2d 1333, 1341 (2nd Cir. 1973)("this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement."); *Shield Club v. City of Cleveland,* 370 F. Supp. 251, 256 (N.D. Ohio 1973) ("[a] substantial increase in the number of black and Hispanic police officers in the Department should assist the Cleveland Police Department in administering its overwhelmingly difficult and daily frustrating job of enforcing the law in Cleveland. This is particularly true in the "high crime area" to which the Impact Cities Program is directed."). *See also, Erie Human Relations Comm.*

(footnote continued)

D. No Means Other Than Consideration of Race Would Achieve the Same Compelling Governmental Interests.

Under the "strict scrutiny" standard, the Department must demonstrate that the burden which the Affirmative Action Plan places on white employees is "necessary to promote a substantial state interest" which could not equally be served by means other than an explicit racial classification. *Bakke,* 438 U.S. at 320 (Powell, J.). The record below supports the reasonableness of the Department's judgment that there are no racially-neutral alternatives to its Plan.[72] Nor is the effect which the Department's Plan has on white employees unreasonable, in light of the several compelling purposes which the Plan serves. This is so for several reasons.

First, the Department's Affirmative Action Plan affects white male officers only imperceptibly, and far less than many other forms of affirmative action. While special admission programs, such as the one invalidated in *Bakke,* may in practice result in the permanent exclusion of a non-minority applicant from professional education, the principal detriment to any white males affected by the Department's program is to temporarily defer possible promotion. The record demonstrates that despite the Department's Affirmative Action Plan, most promotions are still being given to non-minority officers. C.T. 563; *see* Ex. 2, p. 2, R.T. 43, 45, 440-42, 482-83. If as a result of the affirmative action effort some white males have not obtained a particular appointment they would otherwise have received, there is no evidence that these individuals failed to obtain a promotion soon thereafter. Morever, the Department's program entails no "bumping" and removes no employee from any position or status which he had previously attained. *Compare Kirkland v. New York State Department of*

(footnote continued)

v. Tullio, 493 F.2d 371 (3d Cir. 1974); *Pennsylvania v. O'Neill,* 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd in part and vacated in part,* 473 F.2d 1029 (3d Cir. 1973) (en banc); *NAACP v. Allen,* 493 F.2d 614 (5th Cir. 1974).

[72] While the Department submitted such a proposed finding (C.T. 1084), the Superior Court did not reach the issue because it deemed racial criteria *per se* invalid. Petitioners' proposed findings on this issue (C.T. 623-24, 649) were similarly rejected. Petitioners' statements that the Superior Court found that the Department's Plan did not serve the State's compelling interest in secure prisons (Pet. Br. 3-4, 11-13, 27-28) are thus erroneous.

Correctional Services, 520 F.2d 420, 429 (2nd Cir. 1975), *cert. denied,* 429 U.S. 823 (1976); *Teamsters v. United States,* 431 U.S. 324 (1977). The minimal extent to which the expectations of white employees may be affected by the Department's program, as well as the relatively small number of employees affected, bears significantly on the reasonableness of the program. *See Franks v. Bowman Transportation Co.,* 424 U.S. 747, 794-99 (1976)(Powell, J., concurring and dissenting); *Fullilove, supra,* at 4989 (Opinion of Burger, C.J.); *id.* at 4997 (Powell, J., concurring).[73] Thus, it was not surprising that Petitioners were unable to identify any individual who actually failed to obtain a promotion due to the Department's affirmative action policy.

Moreover, the expectations of some white male officers for earlier promotions necessarily have been predicated in large part on a promotional system in which these officers had a decided advantage. Extending somewhat the waiting period for promotion is an inevitable consequence of bringing minority members within the promotional pool; to the extent that any minority members rise faster than they might have done in the absence of affirmative action, they may be making up for time lost when promotions were not equally available to them, and the white officers temporarily passed over in all probability are losing nothing which they would have had in the absence of prior discrimination.[74]

Second, the California legislation establishes several layers of administrative and legislative oversight for the development and implementation of affirmative action plans. The California State Personnel Board, an agency charged by the California Constitution with the duty to enforce the merit principle in state employment, Cal. Const. Art. VII, §§1(b), 3(a), is responsible for approving all goals and timetables contained in affirmative action plans filed by state agencies. Cal. Gov't. Code § 19790.

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[73] *See also* Brest, *Foreword: In Defense of the Antidiscrimination Principle,* 90 Harv. L. Rev. 1, 36-41 (1976); Davidson, *Preferential Treatment and Equal Opportunity,* 55 Ore. L. Rev. 53, 75 (1976); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem,* 23 U.C.L.A. L. Rev. 177, 202, 224 (1975).

[74] Karst & Horowitz, *Affirmative Action and Equal Protection,* 60 Va. L. Rev. 955, 965 n.35 (1974); *see Franks v. Bowman Transportation Co., supra,* 424 U.S. at 767-68; Brest, *supra,* 90 Harv. L. Rev. at 37 (1976).

The Board is also required to "[r]eview and evaluate departmental affirmative action programs to insure that they comply with federal statutes and regulations." *Id.* §19792. Each year, the Board must report to the Governor, the Legislature, and the Department of Finance as to the accomplishment of each state agency in meeting its affirmative action goals. *Id.* §19793. The "equal employment opportunity efforts and affirmative action progress" of each state agency is then reviewed by the Legislature during its evaluation of the annual state Budget Act. *Id.* There is thus continuing oversight to ensure that state agencies adhere to proper standards in their affirmative action efforts.

Third, an employee who believes that he or she has been unjustifiably discriminated against by the Department's Plan has several remedies to challenge its implementation. The employee may first pursue a grievance internally within the Department of Corrections. The grievance must be pressed first with the employee's immediate supervisor (if the supervisor has jurisdiction to provide a remedy) and then, if the decision is unsatisfactory, raised with the appropriate division or section chief. Ex. 21 at 2. The grievant may then appeal to the Director of the Department. *Id.* These procedures provide for quick review[75] and ensure that the grievance will come to the attention of the highest policy-makers within the Department.

Following exhaustion of internal administrative remedies, an employee may appeal to the State Personnel Board, which has a mandate "to insure that unlawful discrimination does not occur in the State civil service." 2 Cal Admin. Code § 547; *see id.* §§ 540 *et seq.;* R.T. 236-53. Judicial review of the Board's decision may also be had pursuant to California Code of Civil Procedure Section 1094.5. *See, e.g., Dawn v. State Personnel Board,* 91 Cal. App. 3d 588 (1979).

State law thus provides three different procedural remedies for persons who believe they have been aggrieved by the Department's Affirmative Action Plan, in addition, of course, to those provided by federal law. Here, as in *Fullilove,* "the

[75] The first and second grievance levels are required to respond within 15 days of the submission of the grievance, while the Director has 20 days in which to respond. *Id.*

administrative process gives reasonable assurance that . . . misapplications of the racial and ethnic criteria can be remedied." 48 U.S.L.W. at 4990 (Opinion of Burger, C.J.)[76] Petitioners' claim that the Affirmative Action Plan provides "no appeal rights for non-minorities . . . , adversely affected by it" (Pet. Br. 20) is thus misleading. The Plan does not include an appeal procedure because such remedies already exist.[77]

Fourth, the Department's Affirmative Action Plan was designed as a temporary, five-year measure. Ex. G, cover letter, 11; Ex. R at 18. While the failure fully to achieve its goals within the original time period has required the extension of the plan, the new plan is for only five additional years and will be

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[76] While the Department's Plan does not contain a provision like that found in the statute upheld in *Fullilove,* authorizing the Secretary of Commerce to waive compliance with the 10% requirement in appropriate cases, *id.* at 4985, such a provision is not needed. A numerical quota like the MBE provision must contain provisions for exceptions where meeting the quota may be impossible or inconsistent with the agency's statutory mandate. But the Department's program is not a quota system; it merely authorizes the granting of limited preferences where appropriate in light of the Department's needs for a particular position. The "waiver" is thus inherent in the system; it does not need to be grafted on as an extra protection.

[77] Throughout the trial, the Superior Court frequently expressed doubt as to whether the Department could distinguish individuals who were members of minority groups. *E.g.,* R.T. 37-38, 87-88, 191-94, 229-32, 290-300, 355-68, 679-80. Its findings recite that there is "no scientific or objective basis" for such classification, and no dispute-resolution procedure for any complaints on the basis of improper classification. Petn. App. F5-F6. Petitioners contend that the possibility of an individual improperly claiming a racial preference under the Affirmative Action Plan warrants its rejection. Pet. Br. 41-42.

This issue was not raised by the pleadings nor was it an issue at trial. Indeed, there was no evidence that a dispute has ever arisen as to whether a Department employee had been improperly "placed in one [racial] category, instead of another," nor is there any evidence that the grievance procedures of the Department and of the State Personnel Board described above would not provide an adequate "dispute-resolution procedure" if such a dispute were to arise. Petitioners' claim is purely speculative and not ripe for adjudication. *California Bankers Ass'n. v. Shultz,* 416 U.S. 21, 56 (1974); *Communist Party v. Subversive Activities Control Bd.,* 367 U.S. 1, 78 (1961).

In any event, Petitioners' argument leads to absurd results. The proposition that before individuals may be classified by race, there must be some "scientific" procedure to ensure that the class is not under- or over-inclusive, would be equally applicable to desegregation orders, and, indeed, orders involving any type of class-based relief for racial discrimination. Such a novel requirement would make civil rights litigation virtually impossible.

reviewed annually by the State Personnel Board and the Legislature in accordance with the comprehensive statutory scheme discussed above.

Fifth, the racial hostility and tension plaguing California's prisons simply demands increasing the number of minority correctional officers. That is perhaps the principal reason for which reformulating the Department's affirmative action policy to exclude consideration of race and sex and to substitute such racially neutral characteristics as the ability to relate to minority inmates is not a satisfactory alternative. If such a policy forbid administrators from taking race into account in making employment decisions, it would require the Department to close its eyes to the fact that inmates react to staff in a race-conscious manner, thus affecting the manner in which different applicants will be able to perform. *See, e.g.,* C.T. 494-97, 500-02, 504, 510, 525-26, 542, 560-61. If black inmates need black "role models" to increase minority participation in rehabilitative programs, more sensitive white correctional officers are not the answer. Confronted with many institutions with predominantly black and Mexican-American inmate populations, but virtually no minority supervisors, the fact that an otherwise qualified applicant for a supervisory position is a member of such a minority group unquestionably bears upon that applicant's overall qualifications. *See* Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics,* 24 U.C.L.A. L. Rev. 581, 585-86 (1977).

Sixth, there are no feasible alternatives to consideration of race in hiring and promotion by which the Department can effectively place meaningful numbers of minority members and females at all levels of the Department. Forceful recruitment and special training may bring some additional minorities into the Department, and furnish them with necessary skills for advancement. But recruitment and training are not enough. Even assuming that these steps, coupled with a prospective policy of nondiscrimination, might eventually produce a workforce satisfactorily balanced at all levels (*but see, e.g.,* C.T. 562), this certainly would not happen quickly. Even while the Affirmative Action Plan has been in effect, the increase in

minority employment has been slow. C.T. 566. Yet rectifying the present racial imbalance is urgent in light of the explosive conditions within California's prisons.

The legacy of racial discrimination is such that recruitment and training of minority members and women, together with an official policy of nondiscrimination, is not presently enough to compensate for prior discrimination. R.T. 338, 707-08; C.T. 503. The difficulties inherent in advancing minorities to supervisorial positions are compounded by a low turnover rate and the Department's policy of promoting exclusively from within. C.T. 561, 566. At least until such time as minority members and women are dispersed fairly throughout the supervisory structure, so that all employees are treated and evaluated free from the hidden prejudices of a predominantly white male administrative organization, minority officers will continue to be denied fair opportunity for promotion. C.T. 563; *see also* State Personnel Board, Supplemental Report to Assembly Committee on Public Employees and Retirement at 9.

The Department's Affirmative Action Plan thus represents a considered effort to rectify the effects of historic employment discrimination within the Department and carry out the Department's critical mission, while minimizing the repercussions of its program on the understandable concerns of its predominantly white male staff. The Department believes that there are no feasible alternatives that can be expected to accomplish the same objectives. In light of the deference which the Court repeatedly has given to prison officials trying in good faith to carry out their difficult task,[78] the considered judgment of the Department should not be lightly set aside.[79]

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[78] *Bell v. Wolfish, supra,* 441 U.S. at 547-48, 568-69; *Procunier v. Martinez, supra,* 416 U.S. at 404-05; *Jones v. North Carolina Prisoners' Union, supra,* 433 U.S. at 126; *Meachum v. Fano,* 427 U.S. 215, 228-29 (1976); *Baxter v. Palmigiano,* 425 U.S. 308 (1976); *Wolff v. McDonnell, supra,* 418 U.S. at 561-63; *Saxbe v. Washington Post, supra; Pell v. Procunier, supra,* 417 U.S. at 826.

[79] Petitioners also attack the Affirmative Action Plan because it was not the product of collective bargaining. Pet. Br. 42-44. Their argument overlooks the fact that, as of 1974, when the Department adopted the plan, state agencies had no duty to meet and confer with employee organizations except "upon request" (Cal. Gov't. Code § 3530) and nothing in the record indicates that the CCOA made a request for meet and confer sessions prior to

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IV.

NEITHER TITLE VII NOR THE FOURTEENTH AMENDMENT PROHIBITS CONSIDERATION OF GENDER IN CONNECTION WITH THE DEPARTMENT OF CORRECTIONS AFFIRMATIVE ACTION PLAN.

The Department's history of discrimination against female job applicants and employees is unambiguous. As late as 1974, women were explicitly barred, as a matter of official policy, from both entry level and supervisorial positions. Ex. "I"; R.T. 258, 557, 559, 608. Even where women were formally eligible for consideration in hiring and promotion, higher standards were imposed on them for equivalent positions. R.T. 211.

The legacy of this explicit *de jure* discrimination was a correctional work force in which the percentage of women employees in 1973 was less than half that in the California labor force as a whole. Ex. "G" at 22. If one excludes clerical employees and other traditionally female positions, the disparity was even greater. *Id.* at 23-24, 35-36.[80] Female employees also earned substantially less than their male counterparts, the result of their concentration in the clerical and subprofessional staff. *Id.* at 23, 32.

The constitutional validity of the Department's efforts to remedy the effects of its prior discrimination simply cannot be doubted. At least three decisions of this Court, *Kahn v. Shevin*, 416 U.S. 351 (1974), *Schlesinger v. Ballard*, 419 U.S. 498 (1975), and *Califano v. Webster*, 430 U.S. 313 (1977), have

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(footnote continued)

the adoption of the Affirmative Action Plan. Morever, nothing in either state or federal labor law requires an employer to obtain *consent* of a union before taking action affecting its employees. The duty of the employer is only to bargain in good faith. *H.K. Porter v. NLRB*, 397 U.S. 99 (1970). Accepting Petitioners' argument would constitutionalize the states' laws concerning collective bargaining with their own employees. *Cf. Branti v. Finkel*, 445 U.S. 507 (1980) (Powell, and Rehnquist, JJ., dissenting).

[80] For example, as of 1973, women accounted for only five of 172 policy making adminstrative positions, eight of 342 correctional captains or supervisors, and 11 of 186 correctional lieutenants. Ex. "G" at 35-36. By contrast, out of a clerical staff of 827, 775 were female. *Id.*

upheld gender-based classifications which served the "laudatory purpose" of "remedying disadvantageous conditions suffered by women in economic . . . life." *Craig v. Boren*, 429 U.S. 190, 198, n.6 (1976). *Schlesinger v. Ballard, supra*, holds that women may be granted preferential treatment in promotion if necessary to assure fairness to female employees adversely affected by other prior or contemporaneous practices of the employer. *Kahn v. Shevin, supra*, and *Califano v. Webster, supra*, hold that the state may explicitly take sex into account if the gender-based classification tends to rectify the subordinate status of women in our economy and society.

Like the statutes upheld in *Kahn, Ballard* and *Webster*, the Department's Affirmative Action Plan was designed to ameliorate the continuing effects of economic discrimination against women. Its purpose, like the challenged statute in *Ballard*, is "to provide women [employees] with fair and equitable career advancement programs". *Schlesinger v. Ballard, supra*, at 508. Since the goal of redressing discrimination against women has been held to justify remedial gender-based classifications, the constitutionality of the Plan in this regard is clear.[81]

Indeed, under *Kahn* and *Webster*, the Department need not even show that *it* discriminated against female employees in order to justify its remedial efforts. The Court in those cases upheld favorable treatment of women on the ground that it ameliorated "our society's longstanding disparate treatment of women," without any showing that the defendants themselves had been guilty of prior discrimination against women. *Califano v. Webster, supra*, at 317; *see also Kahn v. Shevin, supra*, 416 U.S. at 353. In *Ballard*, the Army's prior discrimination against female officers was conceded to have been legal. Hence the claim (Pet. Br. 44-45) that the Department failed to prove its own prior discrimination against women is not only factually incorrect, but also legally irrelevant.[82]

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[81] Petitioners also seem to argue that the Department has failed to show that its gender-based employment preferences are supported under California law. Pet. Br. at 20, 44-45. Even if this were true, the claimed violation of California law is not reviewable here.

[82] Petitioners also contend that Respondents are collaterally estopped from claiming that they have discriminated against women by the case of

(footnote continued)

As with consideration of race, there are other governmental interests justifying consideration of sex in hiring and promotion. There is growing recognition of the importance of including a fair proportion of female officers at virtually all correctional positions to accomplish the compelling state interests discussed in Part III(C), *supra*. Evidence in the record showed that the presence of women tends to improve inmate behavior and reduce violence and, by restoring to institutional life a vital element of normal society, often facilitates the task of rehabilitation. C.T. 505-06, 511-12; R.T. 444, 485-86, 583, 594, 611-13; *see* Ex. 24.[83] The compelling importance of easing prison tensions and promoting rehabilitation of inmates (*see* pp. 43-50, *supra*) and the reasons why less explicit alternatives to the Department's program would be inadequate (*see* pp. 55-56, *supra*) provide as much justification for consideration of sex as for consideration of race. Indeed, whatever skills in race relations may be imparted by training to white officers, the normalizing influence of female presence can hardly be duplicated in the absence of women.

Nor does the Department's program have a severe impact on male officers, as is well-illustrated by contrast with *Schlesinger v. Ballard, supra*. The statute there attacked had the direct result of diminishing promotional opportunities available to male officers in contrast to female officers similarly situated; indeed, the statute imposed automatic loss of employment on those male employees who came within its terms. Here, by contrast, no male employees have been or will be terminated by reason of the Department's Affirmative Action Plan and, in fact, the overwhelming majority of promotions within the Department still go to males. C.T. 563.

The same result obtains under Title VII. *Weber* holds that voluntary affirmative action programs designed to remedy

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Long v. State Personnel Bd., 41 Cal. App. 3d 1000 (1974). Pet. Br. 46 n.12. Contrary to their claim that *Long* upheld "Respondents' policy of issuing "male-only" certifications" (*id.*), that case involved certifications issued by the California Youth Authority. *See* 41 Cal. App. 3d at 1003. The Department of Corrections was not a party to that suit.

[83] *See also* National Conference on Corrections, *We Hold These Truths* . . . , pp. 94-95 (1971); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, pp. 379, 476-77 (1973).

"manifest . . . imbalances in traditionaly segregated job categories" are permissible under that statute. 443 U.S. at [illegible] Nothing in *Weber* limits its reach to redressing racial—as opposed to gender-based—discrimination. Indeed, it would be difficult to imagine a more "traditionally [sex] segregated job category" than correctional officers in all-male prisons. Since race-conscious affirmative action efforts may be subject to stricter constitutional scrutiny than is applicable to analogous actions based on gender (*compare Bakke,* 438 U.S. at 302-03 (Powell, J.) with *Califano v. Webster, supra*), it would be surprising if *Weber* gave employers less flexibility in seeking to redress gender-based wrongs than in seeking to remedy racial discrimination.

CONCLUSION

For the reasons advanced above, the decision of the California Court of Appeal should be affirmed. Alternatively, the writ of certiorari should be dismissed as improvidently granted or the action remanded to the state courts for further findings and consideration of the issues not heretofore considered below.

DATED: October 17, 1980.

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APPENDIX A

California Government Code § 18930

Examinations for the establishment of eligible lists shall be competitive and of such character as fairly to test and determine the qualifications, fitness and ability of competitors actually to perform the duties of the class of position for which they seek appointment.

Examinations may be assembled or unassembled, written or oral, or in the form of a demonstration of skill, or any combination of these; and any investigation of character, personality, education and experience and any tests of intelligence, capacity, technical knowledge, manual skill, or physical fitness which the board deems are appropriate, may be employed.

California Government Code § 19702

A person shall not be discriminated against under this part because of sex, race, religious creed, color, national origin, ancestry, or marital status except that positions which in the opinion of the appointing power and the board require the services of a specific sex may be reserved to that sex.

California Government Code § 19702.1

Hiring and promotion pursuant to this part shall conform to the Federal Civil Rights Act of 1964.

California Government Code § 19702.2

Educational prerequisites or testing or evaluation methods which are not job-related shall not be employed as part of hiring practices or promotional practices conducted pursuant to this part unless there is no adverse effect.

Nothing in this section shall be interpreted to limit the authority of the State Personnel Board regarding the state merit selection and examining program under Article XXIV of the California Constitution and this division.

California Government Code § 19702.5

(a) The [State Personnel B]oard shall provide to the State Fair Employment Practice Commission a copy of each affirmative action plan, and all subsequent amendments of such plans, adopted by each state agency, department, office or commission.

(b) The board shall annually, commencing January 1, 1975, submit to the State Fair Employment Practice Commission a statistical survey of the employment of each state agency, department, office or commission. The survey shall include, but not be limited to: sex, age, ethnic origin, current employment classification, salary, full-time or other employment status, department and administrative unit, and county of employment of employees.

(c) Such reports and information shall constitute public records.

Statutes 1977, Chapter 943 (California Government Code §§ 19790-97 (Preamble))

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) The State of California remains committed to its policy of nondiscrimination and equal employment opportunity and to continuing and expanding positive programs which will assure the strengthening of this policy. To this end the Legislature accepts leadership responsibility for insuring that equal employment opportunities are available to all applicants and employees in all agencies and departments in the state civil service system.

(b) It is the policy of the Legislature to encourage the state civil service system to utilize to the maximum all available human resources to provide equal employment opportunity to all persons without regard to race, color, religion, national origin, political affiliation, sex, age, or marital status; and, insofar as possible, to achieve and maintain a work force in which are represented the diverse elements of the population of the State of California.

(c) Beyond assurances of nondiscrimination, it is the policy of the State of California to have each state hiring unit initiate comprehensive written affirmative action programs which will take steps to remedy any disparate staffing and recruitment patterns.

(d) This equal employment opportunity policy is adopted to insure that maximum utilization of human resources occurs, that true equality of opportunity is a reality with the State of California, and that the rights of all employees and applicants are safeguarded.

SECTION 2. Chapter 12 (commencing with Section 19790) is added to Part 2 of Division 5 of Title 2 of the Government Code, as follows:

CHAPTER 12. STATE CIVIL SERVICE AFFIRMATIVE ACTION PROGRAM

California Government Code § 19790

Each agency and department is responsible for establishing an effective affirmative action program. The State Personnel Board shall be responsible for providing statewide advocacy, coordination, enforcement, and monitoring of these programs.

Each agency and department shall establish goals and timetables designed to overcome any identified underutilization of minorities and women in their respective organizations. Agencies and departments shall determine their annual goals and timetables by June 1 of each year beginning in 1978. These goals and timetables shall be made available to the board for review and approval or modification no later than July 1 of each year.

California Government Code § 19791

As used in this chapter:

(a) "Goal" means a projected level of achievement resulting from an analysis by the employer of its deficiencies in utilizing minorities and women and what reasonable remedy is available to correct such underutilization. Goals shall be specific by the smallest reasonable hiring unit, and shall be established separately for minorities and women.

est reasonable hiring unit, and shall be established separately for minorities and women.

(b) "Timetable" means an estimate of the time required to meet specific goals.

(c) "Underutilization" means having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability.

California Government Code § 19792

The State Personnel Board shall:

(a) Provide statewide leadership designed to achieve positive and continuing affirmative action programs in the state civil service.

(b) Develop, implement, and maintain affirmative action and equal employment opportunity guidelines.

(c) Provide technical assistance to state departments in the development and implementation of their affirmative action programs.

(d) Review and evaluate departmental affirmative action programs to insure that they comply with federal statutes and regulations.

(e) Establish requirements for improvement or corrective action to eliminate the underutilization of minorities and women.

(f) Provide statewide training to departmental affirmative action officers who will conduct supervisory training on affirmative action.

(g) Review, examine the validity of, and update qualifications standards, selection devices, including oral appraisal panels and career advancement programs.

(h) Maintain a statistical information system designed to yield the data and the analysis necessary for the evaluation of progress in affirmative action and equal employment opportunity within the state civil service. Such statistical information shall include specific data to determine the underutilization of minorities and women. The statistical information

shall be made available during normal working hours to all interested persons. Data generated on a regular basis shall include, but not be limited to, the following:

(1) Current state civil service work force composition by race, sex, age, department, salary level, occupation, and attrition rates by occupation.

(2) Current local and regional work force and population data of women and minorities.

(i) Data analysis shall include, but not be limited to, the following:

(1) Data relating to the utilization by department of minorities and women compared to their availability in the labor force.

(2) Turnover data by department and occupation.

(3) Data relating to salary administration, such as average salaries by race and sex, and comparisons of salaries within state service and comparable state employment.

(4) Data on employee age, and salary level compared among races and sexes.

(5) Data on the number of women and minorities recruited for, participating in and passing state civil service examinations. Such data shall be analyzed pursuant to the provisions of Section 19704 and 19705.

(6) Data on the job classifications, geographic locations, separations, salaries, and other conditions of employment which provide additional information about the composition of the state civil service work force.

California Government Code § 19793

By November 15 of each year beginning in 1978, the State Personnel Board shall report to the Governor, the Legislature, and the Department of Finance on the accomplishment of each state agency and department in meeting

its stated affirmative action goals for the past fiscal year. The report shall include information to the Legislature of laws which discriminate or have the effect of discrimination on the basis of race, color, religion, national origin, political affiliation, sex, age or marital status. The Legislature shall evaluate the equal employment opportunity efforts and affirmative action progress of state agencies during its evaluation of the Budget Bill.

California Government Code § 19794

In cooperation with the State Personnel Board, the director of each department shall have the major responsibility for monitoring the effectiveness of the affirmative action program of the department.

California Government Code § 19795

The secretary of each state agency and the director of each state department shall appoint an affirmative action officer, other than the personnel officer, except in a department with less than 500 employees the affirmative action officer may be the personnel officer who shall report directly, and be under the supervision of the director of the department, to develop, implement, coordinate, and monitor the agency or departmental affirmative action program. The departmental or agency affirmative action officer shall, among other duties, analyze and report on appointments of employees, request appropriate action of the departmental director or agency secretary, submit an evaluation of the effectiveness of the total affirmative action program to the State Personnel Board annually, monitor the composition of oral panels in departmental examinations, and perform other duties necessary for the effective implementation of the departmental and agency affirmative action plans.

The departmental and agency affirmative action officers shall be assisted in these responsibilities by an equal employment opportunity committee as determined by the department whose day-to-day responsibilities are vital to the effective implementation of the affirmative action program.

California Government Code § 19796

Bureau or division chiefs within a department or agency shall be accountable to the department director for the effectiveness and results of the program within their division or bureau. Each bureau or division may assign an administrator to assist the departmental affirmative action officer.

All management levels, including firstline supervisors, shall provide program support and take all positive action necessary to ensure and advance equal employment opportunity at their respective levels.

California Government Code § 19797

Each state agency and department shall develop, update annually, and implement an affirmative action plan which shall at least identify the areas of underutilization of minorities and women within each department by job category and level, contain an equal employment opportunity analysis of all job categories and levels within the hiring jurisdiction, and include an explanation and specific actions for improving the representation of minorities and women.

California Labor Code § 1413

As used in this part, unless a different meaning clearly appears from the context:

. . .

(d) "Employer," except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.

"Employer" does not include a religious association or corporation not organized for private profit.

California Labor Code § 1420

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ him or to refuse to select him for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

. . .

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of the person discriminated against.

APPENDIX B

The following is a summary of the facts concerning the history of employment discrimination within the California Department of Corrections which the Department offered to prove in its Motion to Augment Record. C.T. 670, 688. For the sake of completeness and coherence, to the extent that related evidence was also presented at trial, references to such evidence also are cited below.

Sex-based discrimination within the Department of Corrections was a matter of official policy as recently as 1974. Written job descriptions explicitly barred qualified women from consideration for many positions, both at entry levels and in supervisorial capacities. Ex. "I", R.T. 258, 557, 559, 608; *see* C.T. 874, 880, 945-46, 949, 951-52, 955. Where comparable job opportunities did exist, women were required to meet higher standards than men. R.T. 211; C.T. 974; 952.

Discrimination within the Department against racial and ethnic minorities was more subtle, but nonetheless pervasive. Historically, California correctional officers were recruited from areas where minority members are not to be found. C.T. 705-06, 833, 853-54, 872, 889-90, 899-900, 932-33, 941, 948, 952, 956, 959, 968. Many of the State's penal institutions have been located in rural areas far removed from urban centers of minority populations; most recruitment was by word of mouth among family and friends of existing white personnel. C.T. 705-06, 853-54, 872, 889-90, 932-33, 941, 948, 956, 959, 963-64, 968. The Department conducted no recruiting in urban ghettos or barrios where large numbers of blacks and Mexican Americans reside. Even at those prisons located near large concentrations of minority members—such as San Quentin and Soledad—no attempt was made to recruit from within those areas. C.T. 833, 872, 889-90, 899, 941, 956. Indeed, the Department refused as a matter of policy to recruit through minority media. C.T. 706, 797.

Rather than seeking out minority applicants, the Department of Corrections actively discouraged them. Throughout the Department, white officers feared that minority members were "radicals", that they would subvert Department authority, and that they might join minority inmates in attacking white

officers in the event of prison disturbances. C.T. 709, 841-42, 852, 854, 872-73, 926-27. At many institutions, black and Chicano applicants were openly told by administrators that they were not welcome. C.T. 837-39, 967. At other institutions, such covert mechanisms were employed as intentionally withholding notices of job opening, C.T. 706-07, 911, 972, 977, falsifying the results of qualifying physical examinations, C.T. 708, 972-73, 977, and deliberately disqualifying minority applicants on the basis of subjective oral interviews. C.T. 833, 940-41. According to the present warden of the California State Prison at Folsom:

> "In the course of my duties [prior to 1970], I sat on interview panels to consider applicants for correctional positions in the camp system. During that period, I personally participated on interview panels where decisions were made not to hire otherwise qualified minority applicants for positions in the camp system on the basis that minorities were not acceptable in the predominantly Caucasian rural communities." C.T. 883;18-24.

A disproportionately large percentage of minority applicants was excluded on the basis of written entrance examinations that, by 1964, were known to be culturally biased. C.T. 707-08, 948-49, 956, 993-94. A 1964 Departmental memorandum acknowledged that "the non-white who applies to the Department of Corrections for the position of correctional officer has less than a 10% chance of getting over both the written and oral examination hurdles." C.T. 798.

Those minority members who nonetheless succeeded in obtaining employment were discouraged from remaining. Verbal abuse, intimidation and physical harassment were commonplace. C.T. 833-34, 836-37, 843-44, 851, 854, 864, 891, 894-95, 897, 910, 926-27, 936-39, 969, 973, 977-78. As described by one white male correctional counselor:

> "[A] critical discriminatory factor in that period and one which persists to this day was simply the treatment of minority employees by their peers and supervisors in the Department. Deep-seated prejudices against Chicanos and Blacks were expressed in

> many ways, all of them calculated to intimidate and harass. Minority employees were snubbed, ostracized and often subject to verbal insults and racial name-calling such as "nigger", "buckwheat", "greaser" and "spick". Often the harrassment was petty in nature; lunches would mysteriously disappear from locked rooms or be found to contain urine. In other cases, the behavior ran to fundamental issues of effectiveness and prison security, as when white inmates were incited to harass Chicano and Black officers." C.T. 873.

According to one black male officer, later to become an associate superintendent:

> "[B]lack officers at Chino were frequently treated with disrespect. On one occasion I was ordered by Sergeant Riccardi to bus his dishes although this was not part of my duties as a search and escort officer. When I picked up the tray of dishes to remove them from the room, Sergeant Riccardi kneed me and told me to 'get a move on, boy.' On another occasion I heard an in-service training officer refer to a baton as a 'nigger headcracker.' This remark was made to a class which included black officers." C.T. 936-937.

Minority members were denied customary job orientation, C.T. 840, 884, 895, 903-04, and conscious efforts were made to "bomb out" as many as possible during their probationary period. C.T. 840, 844-45, 851, 970. According to one Chicano officer, who later became a superintendent, who began his career at the California Training Facility at Soledad:

> "Every new employee undergoes a probationary period during which his performance is closely evaluated. Particularly during this period, supervisory personnel and staff members go out of their way to haze new minority employees. In my own experience I recall that I was assigned the gun tower dogwatch when I first began as a CO and my lieutenant used to creep up on my tower through the weeds frequently, trying to catch me asleep and give me a bad report. New Anglo CO's received no similar treatment." C.T. 851.

Minority officers customarily received less desirable duty and shift assignments and were completely excluded from some of the most preferable posts. C.T. 526, 837, 840-41, 845, 849-52, 879, 883-85, 890, 901, 905-07, 912, 927, 930, 936; R.T. 212-13. They often were subjected to arbitrary and unequal discipline. C.T. 837, 845, 851, 885, 903-04, 912, 937, 969. As a consequence of this treatment, many blacks and Mexican-Americans left the Department. *E.g.*, C.T. 844, 845, 855, 875, 886-87, 894, 896, 956, 978.

Minority members who did not succumb to such discriminatory practices were denied advancement opportunities afforded to white officers. Throughout the Department, minorities were systematically excluded from many of the training programs and acting assignments leading to accelerated advancement. C.T. 884-86, 890, 911-12, 929-30, 941-942. Unvalidated written promotional examinations excluded many qualified minority officers from promotional consideration. C.T. 708, 912-13, 948-49, 953, 993-95; R.T. 370-71. Many more were passed over in oral promotional examinations by panels consisting almost exclusively of white males, whose prejudices unquestionably influenced the consistently low evaluations of minority officers. *E.g.*, C.T. 708-09, 842, 879-80, 886-87, 942-43, 953-54, 960-61, 967-68, 978; R.T. 372, 824-25, 833, 872-73, 883. As described by one black officer who finally left the Department in frustration (and who returned after affirmative action efforts had begun):

> "Prior to 1967, I took four written promotional examinations and passed each of them. However, in each case, my overall score on the promotional examination, after including the results of the oral examination was a score which was a small fraction under 77 (i.e. 76.86 and the like). A score of 77 was the minimum passing grade necessary to be placed on the promotional list. At one of the oral examinations which I took, one of the questioners indicated clear hostility to me from the start of the examination session; before I had said a word, it was clear to me that I would not be considered. In 1966, when I was walking in to take the oral examination, an associate warden asked me why I was wasting my

> time taking the promotional examination. On other occasions in 1966, I was told by a program administrator that I should not expect to receive a promotion. Finally, in 1967, I too became discouraged and convinced that I could never obtain a promotion within the Department of Corrections. That is the reason I left the Department in 1967." C.T. 886-887.

When a minority member did manage to rise to the top of a promotional list, various subterfuges were used to circumvent the civil services requirements and to avoid promoting "dumb Mexicans" and blacks. *See* C.T. 853, 877-78, 901-03, 907-08, 942-43, 955. In several instances where minorities were placed in supervisory positions, picketing and strikes occurred. C.T. 709, 879, 969.

Largely because of these discriminatory practices, most institutions within the Department were, as of the 1960's, "virtually all white male organizations." C.T. 704; *see also* Ex. "Q" at 5; R.T. 547, 593, 879, 892-93. In 1963, 91.9% of the staff of the Department of Corrections was Caucasian, C.T. 983.

Although some progress towards improving the racial and sex balance throughout the Department has been made as a result of the Affirmative Action Program, *see* Ex. "N" at 1-2, 12, a pattern of resistance to the employment and promotion of minorities continues at many levels throughout the Department. Newly hired or promoted employees continue to be subjected to various forms of harassment, particularly at institutions where patterns of staff segregation remain acute. *E.g.*, C.T. 835, 853, 873, 874-75, 894-95, 897-98, 910-11, 927-28, 929, 945, 950, 973-74, 978-80. For example, according to the Superintendent of California Conservation Center as Susanville:

> "Although the Department's Affirmative Action Program has made substantial progress in alleviating racial discrimination at many institutions, certain institutions within the Department remain overtly hostile to the hiring of minorities and women. At the California Conservation Center, which has historically been a virtually all-white male institution, minority employees have been physically attacked, have had their tires slashed, have had eggs placed in their

> automobile gasoline tanks, have received threatening telephone calls and letters, and have otherwise been subjected to direct abuse. When the first black lieutenant was assigned to this institution, a snake was put into his room at the bachelor officers' quarters. During a visit to the Center shortly before I became Superintendent [in September 1976], I saw an obscene photograph of a woman and a slogan opposing affirmative action for women posted on a bulletin board. Other literature criticizing affirmative action for minorities has been circulated." C.T. 890-91.

Later, a handbill was circulated by the staff at this institution referring to the former Japanese-American Director of the Department as "the esteemed Kamakazi pilot who prefers to run the Department through his Goddamned affirmative action guidelines", C.T. 891; Dr. Shockley's articles on the genetic inferiority of blacks were widely distributed among the staff at another institution, C.T. 854, and Nazi emblems are still being worn at a third. C.T. 929.

There remains a pronounced absence of minorities at supervisory levels throughout the Department. As of June 1976, minorities held only 13.8% of the supervisory positions within the prisons, and 16.3% of the supervisory positions Department-wide. Ex. "N" at 17, 24; *see also* Ex. "L". At the Sierra Conservation Center at Jamestown, where only 11.4% of the correctional officers were minorities, only 5.5% (six out of 109) of the supervisors at that institution were minority members. Ex. "N" at 17.

With respect to continuing discrimination against women, the program adminstrator at the California Correctional Institution at Tehachapi stated:

> "Although women are no longer overtly excluded from most Departmental employment and the educational requirements for both sexes are now identical women continue to suffer from severe sexual discrimination in the Department. There has been and remains a deep hostility among male personnel toward the very idea of women occupying inmate

> supervisory or administrative positions in a men's institution. This hostility is expressed in many ways, often directly in blunt language, often indirectly through social ostracism and incitement of inmates. As one example, it has been and continues to be common for women officers at the Tehachapi facility to receive nuisance telephone calls, both on and off the grounds. Indeed, sometimes these calls are received over the in-house call boxes during inmate counts, leaving little doubt that it is Department personnel who are responsible. These calls are extremely abusive, similar in kind to one recent instance in which the caller stated: 'Bitch, you're taking up a job from some good man'." C.T. 874-875.

In the opinion of the Department's leadership, the slackening of affirmative action efforts at this time unquestionably would cause a reversion towards the discriminatory patterns of the past. This is so largely because of the lingering hostility towards minorities and women among the predominantly white male middle level supervisors. According to the former Director of the Department:

> "Since the adoption of the Department's Affirmative Action Program, there has been a visible change in the racial composition of the Department's work force, although minorities still are conspicuously absent at several institutions and at supervisory positions in most institutions. As a result of the increased number of minority employees, it has become less acceptable for staff members openly to express their prejudices towards minorities. Nonetheless, in the performance of my duties as Director, I am continually reminded that these discriminatory attitudes are still present, although they are more difficult to detect. The ingrained prejudices of a great many first line and intermediate level supervisors are still such that qualified minority members are regarded as less capable than white males with lesser or, at most, equal qualifications.

Sometimes without realizing it, supervisors assume that a white would be more qualified for a position, and do not in fact give fair and equal consideration to competing minority applicants. Since the selection of the most qualified applicant often depends largely on subjective factors, it is especially difficult to prevent racial prejudice from adversely affecting the promotion of minority applicants.

"It is still common in the Department to encounter highly qualified minority employees who for many years were passed over for promotion. Moreover, institutionally there is still considerable support and protection for white male officers that as a practical matter does not exist for minority officers . .

"Thus, if the administration were compelled to discontinue its conscious efforts to ensure that qualified minority members are promoted within the Department, I believe it is unquestionable under present conditions that minorities would not receive their fair proportion of promotions and that the slight progress in rectifying the historical pattern of discrimination that has been made over the past eight years would be quickly undone." C.T. 979-980

Given present conditions, the senior administrators and the superintendents of every institution in the California prison system are unanimous in their view that there is no effective alternative to the consideration of the race and sex of applicants in making employment selections if minorities and women are to receive fair and equal treatment and a balanced work force is to be achieved in the foreseeable future; in their view, if "forced to close our eyes to race and sex," it will be impossible effectively to counteract the prejudices against minorities and women that are still present after years of discrimination. C.T. 913, 834-35, 845-46, 880-81, 891-92, 908, 950, 974, 979-80.

Supreme Court, U. S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

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Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

Respondents and some of their *amici* have endeavored mightily to obfuscate both the true state of the record in the Trial Court and the employment practices of Respondents. Indeed, Respondents treat the record as if there was no such thing as the "substantial evidence rule." Furthermore, they and certain *amici* attempt to mislead this Court by suggesting that the Affirmative Action Program (AAP) in question, and ~~its,~~ resultant employment practices, were indeed designed to remedy past discrimination but that somehow Respondents neglected to argue this to the Trial Court. In fact, Respondents filed explicit post-trial Points and Authorities claiming that their practices were justified both by alleged prior discrimination *and* by "operational

necessity." Respondents alleged that the prison staff of the Department "has been almost exclusively white male" (Resp. Br. 43); yet the AAP itself points out that, at the time of its adoption, in comparison to the state labor force "Blacks are over-represented by approximately 2.5% of their expected proportion. . . ." Jt. App., p. 38. This is hardly an "exclusively white male" work force.

It is appropriate, after reviewing the briefs and claims, to look at what really was going on in the California Department of Corrections (CDC) and at what arguments were indeed made to the Trial Court.

A. The outrageous preferences and set-asides are not products of "misunderstandings" but were required by CDC's top management

That the acts complained of by Petitioners were not "misunderstandings" by low-level personnel is seen in the testimony, both oral and written, *of the top four officials of the Department,* namely Director Enomoto, Chief Deputy Director George Jackson, Assistant Director Carlos Sanchez, and Assistant Director for Women's Affairs, Dorothy Stevens-Roby. R.T. 353; 173. Three of these four testified that, under the AAP, a lesser-qualified minority or female would be hired or promoted over a more-qualified non-minority or male so long as they were at least reasonably close in qualifications. R.T. 307-8 (Enomoto); R.T. 382-383 (Sanchez); R.T. 690-691 (Jackson). Ms. Stevens-Roby testified that a lesser-qualified minority or female would be appointed over a non-minority or male even if there were "a substantial difference in the qualifications." R.T. 111-113.

Both the Director and the Chief Deputy rejected grievances explicitly challenging the advertisement of "minority only" positions, until the State Personnel Board (SPB) intervened. Exhibit 11. Although Enomoto said "I don't recall", about his statement that male Cau-

casians had to "wait about five years for promotions because vacancies would be filled with minorities who have had to wait too long. . . ." (R.T. 285), he did admit that the *only* thing wrong with the quotation was the period of time, i.e., the "five years." R.T. 285-286. However, Mr. Sanchez confirmed the five year period. R.T. 379.

The degree to which set-asides and preferences for lesser-qualified candidates was given was highlighted by the actions of three of the top four management personnel *after* the trial court had issued a preliminary injunction against the granting of preferences and while that Order was in effect. Only two months after the preliminary injunction had issued, a supervisor recommended a female non-minority candidate for the position of Assistant Chief of Institution Services. A memo suggesting that the recommendation be overruled was written by Ms. Stevens-Roby, to Enomoto, via Jackson. Ms. Stevens-Roby noted that "an appointment of a minority female would provide an ethnic and sex balance to this unit." Her recommendation was endorsed by Mr. Jackson with the comment, "agree strongly." Enomoto then passed over the first three persons recommended to him by the supervisor most familiar with the abilities of all applicants, and instead chose the fourth candidate on the list, the minority woman recommended by Ms. Stevens-Roby. These events were all described in a Application for Order to Show Cause and Order to Show Cause Re Contempt of Court, found at C.T. 659-669.[1]

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[1]Two full days of hearings on the Order to Show Cause re Contempt were held, April 20, and 21, 1977. The Court concluded that contemptuous action had occurred but decided to let the officials involved off on the assurances that no further violations of its Order would take place. Thus, the Court stated that it found Ms. Stevens-Roby's "contemptuous," and "in violation of the Court Order." Reporter's Transcript of proceedings of April 20 and 21, 1977, at R.T. 262 of those proceedings.

With regard to the Director himself, Mr. Enomoto stated in a memo, Exhibit 38, that in his search for an assistant for Ms. Stevens-Roby "the first priority was the recruitment of a Mexican-American male" to fill the position, but that "no *other* positions have been finalized." [Emphasis added.]

It is thus clear the set-asides and preferences are not mere "misunderstandings" by lower-level supervisors, middle-management personnel, or people "favorable" to Petitioners. Nor were the actions found at just a few institutions—they were widespread throughout the State. Why? Because Respondents made it clear that managers and supervisors would be judged on their willingness to carry out the dictates of top Department management. Thus, the AAP, as amended on April 1, 1975, in Exhibit "R", stated that top management must "assure that each manager within the division is responsible *and accountable for* meeting specific goals." [Emphasis added.] Enforcement of this policy was more energetic than the simple written statement found above: Mr. Enomoto let it be known that superintendents of various facilities would meet their goals "or else," otherwise, "their own positions might be on the line." R.T. 303 (Enomoto).

B. The set-asides and preferences were pervasive throughout the Department

These practices became wide-spread throughout the State. The superintendent (or "warden") at Soledad said he "wanted a female" for a certain position because he was "committed to the implementation of the Affirmative Action Program of the Department of Corrections." R.T. 71-73. In San Francisco, the position of "correctional case work trainee" was "to be filled by women" on "instructions from Sacramento." R.T. 119-121. At Chino, Caucasian candidates were not even considered for clerical positions, on

authority of the superintendent and associate superintendent of that facility. R.T. 710, 721-722, 724-725. The superintendent at Susanville intended to have between 55 and 60% of all appointments to be minorities (Exhibit 17); he saved positions for women (Exhibit 28); and he approved the appointment of a person described as "a full blooded Mexican which I am told by Mr. C. H. Hull meets all the Affirmative Action Requirements." Exhibit 30. That same superintendent regretted that he had to appoint a male Caucasian to a position in July of 1975, since "we recently have gone through the entire Affirmative Action procedure and *were unable to come up with either women or minorities* even after retesting." Exhibit 31 [Emphasis added].

A superintendent of another facility, Ms. Norma Law, testified on cross-examination by Respondents' attorney that she would hire or promote a less qualified minority over a non-minority to meet the "goal" of the Department of Corrections. R.T. 604-605.

C. The set-asides and preferences involved entry-level, as well as promotional positions

Respondents and at least two amici contend that there was no evidence presented below with regard to hiring and that the evidence only involved promotions. Yet, ample, stark evidence on hiring practices was presented.

The AAP applied to *all* appointments, including promotions and hiring. See Exhibit G, the first version of the AAP, found in the Joint Appendix, and Exhibit R. To implement the policy, a "screening" system was set up for all appointments. Mr. Senon Palacioz was placed in charge of Affirmative Action for "minorities," and Ms. Stevens-Roby was placed in charge of Affirmative Action for women. All appointments had to be cleared through those two persons (R.T. 228), who would ascertain the race or the sex of the people being recommended to see if

the recommending person "has taken into account the Affirmative Action policies of the Department." R.T. 359; R.T. 228; R.T. 331-333; R.T. 193-194.

At entry level, persons applying *to be hired* had their race noted by numbers or letters placed on their application forms or other documents used to decide appointments. R.T. 136-137; 719-722. Mr. Jack Mayo, a Records Officer III, was ordered to mark the applications of minority candidates to indicate their race but was to put down no marking if the applicant were Caucasian. R.T. 702-721.[2]

These policies did not distinguish between entry-level and promotional positions. At Chino, the person in charge of hiring clerical workers was instructed not even to consider Caucasian candidates. R.T. 710. In order to obtain minority employees for the entry-level positions in question, the positions were down-graded from "Typist II" and "Typist I" to "Seasonal Clerk." R.T. 715.

D. The Trial Court record is clear as to Respondents' "prior discrimination" defense

Respondents and some *amici* suggest that the defense of "remedying past discrimination" had not occurred to Respondents' counsel during trial, supposedly because then-current appellate cases dealing with employment discrimination had not discussed the issue of alleged past

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[2]This witness is accused of racism by Respondents. Resp. Br., fn. 6, p. 4. The citation given is to the testimony of Deputy Superintendent James Neiswonger. That testimony was, no doubt, disregarded by the Trial Court, since Mr. Neiswonger was shown to have retaliated against Mr. Mayo for Mayo's testimony at trial, causing the Court to issue an extraordinary order forbidding the CDC and its agents from carrying out such retaliation. See R.T. 814-818; C.T. 274-277. This order was made a part of the Court's Permanent Injunction, Pet. App. G-3. Finally Mr. Mayo explicitly denied ever making the statements described by Neiswonger. R.T. 816.

discrimination. This argument ignores the following inescapable realities of the record:

1. There never has been any nexus between the preferential employment practices adopted and any past discrimination by the Respondents; and,

2. Respondents clearly raised as a defense, in their post-trial Points and Authorities, a line of cases, *then* well-established, stating that employers, both private and public, could take affirmative steps to remedy past discrimination. See in that regard, "DEFENDANTS' FINAL ARGUMENT: POINTS AND AUTHORITIES," commencing at C.T. 278, and particularly at C.T. 284. The post-trial Brief of Respondents cited the California Supreme Court's *Bakke* decision that, in employment situations, an employer might, consistent with the Constitution, take action to remedy past discrimination. This post-trial brief stated that "These cases held that even preference in employment could be maintained where prior discrimination existed." [citations omitted] C.T. 284.[3]

Frankly, Respondents and their supporters obfuscate and misstate the evidence and the factual conclusions of the trial court, as if the "substantial evidence" rule did not exist, and, indeed, as if the trial court had found in their favor and the roles of Petitioners and Respondents were reversed. The truth is that a Department of our largest state has, in pursuit of some societal goal deemed desir-

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[3]This legal point was not disputed by Petitioners in their Post-Trial Brief. Petitioners simply pointed out that there had been no past discrimination, that the AAP was not designed to correct same, and that a truly remedial plan must take into account the interests and expectations of innocent co-workers. C.T. 362-366. This last point is one we again urge here, with the added suggestion that this Court's decision in *I.B.T. v. U.S.*, 431 U.S. 324 (1977) sets the appropriate equitable standards for such a plan. Pet. Opening Bf., pp. 47-48.

able by certain bureaucrats, adopted a program totally inconsistent with equal protection under the law and is now scurrying around to forestall review of its activities or to obtain a chance to construct, for the very first time, a *post hoc* justification for its actions.

ARGUMENT

I

THE FOURTEENTH AMENDMENT BARS THE RACIAL AND SEX-BASED PREFERENTIAL EMPLOYMENT PRACTICES OF THE DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN

Faced with this Court's ruling in *Fullilove v. Klutznick*, ... U.S. ...., 48 U.S.L.W. 4979 (July 2, 1980) and the clear intent of the framers of the Fourteenth Amendment, discussed in our Opening Brief, pages 22-23, Respondents and supporting *amici* concede that indeed the Department's AAP can be justified only if it meets the "strict scrutiny" standards articulated by this Court.

Please note that the Permanent Injunction only forbade the granting of "preference" because of race, sex or national origin, rather than forbidding "consideration" of race or sex.

But what the evidence revealed was that people were being totally shut out of the process because of their race or sex, and that racial or sex-based preferences became a "but for" cause of a lesser-qualified minority or female candidate getting the appointment in question. The preliminary determination of qualifications included the numerous factors common in a management decision-making process, including personnel evaluations, attendance records, interviews, personal drive, and "ability to relate to

inmates." R.T. 690-691; R.T. 304-308. Yet, once CDC officials evaluated relative qualifications (including assessing ability "to relate" to inmates), department policy still mandated that lesser-qualified minorities or women be promoted. Both the complete set-asides and the appointment of lesser-qualified individuals, even where non-minorities or males were allowed to compete, require far more justification under the standard of "strict scrutiny" than has been shown by Respondents.

A. The AAP Was Not Designed To, Nor Did It, Remedy Any Alleged Past Discrimination of Respondents

When the AAP was adopted (Exhibit "G", found in the Joint Appendix), Blacks were *"over-represented"* in the Department (Jt. App. pg. 38) and, as to minority groups, "Spanish surname" personnel were under-represented, while Asian, Native American, and "Other" were over-represented, all in comparison to their representation in the California labor force.

For promotions, there was no significant statistical disparity between those competing for promotions, by race, and those promoted. Thus, Black personnel, constituting 8.8% of the CDC work force, received 8.4% of the promotions, while Spanish surname personnel, representing 7.4% of the work force, received 8.1% of the promotions. Jt. App. pg. 30-31. Faced with these labor force figures, which belied any claim of "under utilization" or "adverse impact," let alone past discrimination, CDC attempted to maximize minority representation by requiring the racial composition of its work force to mirror the inmate population, not the California labor force or the Department's applicant pool. To maximize the goal or quota for females, however, the Department seized upon the percentage of women in the labor force, because the female inmate population was a very low percentage. The percentage of

females in the *applicant* pool was ignored. Although given the opportunity to present evidence relevant under the teachings of *Hazelwood School Dist. v. U.S.*, 433 U.S. 299 (1977), CDC never introduced evidence comparing the racial or sexual composition of new hires to the applicant pool. Why? Because CDC literally does not know whether it hires minorities and/or women at a greater or lesser rate than those who seek entry-level positions. R.T. 280-282. Is it overly cynical to suggest that Respondents' ignorance in this regard is the product of disinterest? The purpose of the AAP has not been to remedy any past discrimination but has been to achieve a dubious goal of social engineering propounded by certain managerial bureaucrats.[4]

1. The AAP Implemented By Managerial Officials in the Department of Corrections Was Not Mandated Nor Authorized by Any Findings or Statutes of the Legislature of the State of California

Respondents, instructed by *Fullilove*, attempt yet another *post hoc* justification, articulated for the first time in this Court. By letter of October 17, 1980, Respondents lodged with the Court documents which they hope will cause the Court to believe that the AAP deserves the same deference as the findings of Congress in *Fullilove*.

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[4]Contrary to the assertion, Resp. Br. page 33, Petitioners did not contend that consideration of race or sex by a state agency is *per se* unconstitutional, under all factual conditions. The Points and Authorities cited at C.T. 207-211 dealt with a situation in which a public entity demonstrated no compelling state interest, or less intrusive means, and race or sex played a role in the decision-making process. Petitioners contended in the trial court, and contend here, that once race or sex becomes a factor (and the best analytical way of thinking of it is to consider it a "but for" factor) in the decision-making process, then the "strict scrutiny" standard comes into play.

A close review of all those documents shows that at no time did the California legislature make any *finding* of past discrimination by the State, or any agency thereof, let alone by CDC. A close reading of Respondent's Brief at pages 37-43 shows that neither the State nor Governor Reagan ever authorized or mandated the sort of actions described here.

What one does find are statements that "affirmative action" is appropriate to achieve equal employment opportunity. But nowhere in the documents does one find a statement, a finding, or a mandate by the legislature or Governor Reagan that anything other than equal treatment among citizens should apply. We suggest that there is a world of difference between certain types of "affirmative action" policies (such as aggressive recruitment, education of supervisory and managerial personnel, strict policing of non-discriminatory policies, etc.) and the set-asides and preferential practices employed by CDC. Many of the former type of activities are described in the AAP, Jt. App. pages 20-27. As the trial court found, Petitioners have never challenged such racially and sexually neutral affirmative action policies. Finding 9, Pet. App. F-4.

However, we suggest a distinction between such neutral policies and those involving preferential employment practices (PEP) in which race or sex becomes a "but for" cause of someone receiving an appointment.

While "affirmative action" was discussed in those documents, preferential employment practices certainly were not, and there were no findings either by the legislature or the Chief Executive that the State in general, or CDC in particular, had ever engaged in past discrimination. Our great respect for opposing counsel forces us to conclude that the descriptions contained in fn. 53, Resp. Br. p. 41, are the product of over-zealous advocacy. Assemblyman

Deddeh simply did not say that the State had engaged in prior discrimination. See the Transcript of Hearing of Assembly Committee on Employment and Public Employees Relating to Equal Employment Opportunity in State Service (September 12, 1974) at 2-3. Further, the Supplemental Report to Assembly Committee on Public Employees and Retirement, by the State Personnel Board, at page 1 (December 4, 1975) stated that discriminatory practices remain "deeply embedded in *our basic institutions*" [emphasis added], not "in the State's employment structure," as claimed by Respondents.

Whatever strained interpretation Respondents make of the documents lodged with the Court, it is clear that the documents and findings do not come close to being the sort of considered judgment of a legislature necessary to survive the strict scrutiny standards of *Fullilove*.[5]

2. Respondents and Their Supporting Amici Still Fail to Show Any Nexus Whatsoever Between the AAP as Implemented and Any Alleged Past Discrimination

The complete record at trial, including the text of the Affirmative Action Plan, both in its original edition and as amended, Exhibits "G" and "R", respectively, is devoid of any mention as to how the Plan's design or operation would remedy any past discrimination against minorities and women.

Minorities receive preference *only when parity with the inmate population has not been achieved,* either Depart-

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[5]The Court should also note that the Government Code sections relied upon as authorization for this AAP were not even passed until *after* the trial in this case. Government Code §§ 19790 *et seq.*, found in Resp. Br. A-3 to A-7, were passed in mid-1977, to become effective beginning in 1978. Those sections mention only "Affirmative Action" and do not mandate any sort of preferential employment practices.

ment-wide or at a particular facility. R.T. 186-188 and 195 (Testimony of Dorothy Stevens-Roby); R.T. 309-310 (Director Enomoto); R.T. 374-376 (Carlos Sanchez). The chances of the same two people, one a minority and one a non-minority, varies with regard to job opportunities, depending on whether or not there is "parity" at the particular institution involved. R.T. 309; R.T. 376. If parity has not been reached with the inmate population, then the minority receives preferential treatment. If parity had in fact been reached with the inmate population, then the Department simply hires the most qualified person. R.T. 691.

Even if this Court ignored the substantial evidence rule, and even were it to accept without question the evidence introduced by Respondents at trial concerning past discrimination, and ever were it to accept the materials contained in Respondents' Motion to Augment Record,[6] the simple fact is that the AAP, as implemented, was and is in no way connected with any such alleged past discrimination. As such, the lost opportunities and disappointments of non-minority or male correctional officers cannot be justified under constitutional standards.

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[6]Petitioners do object most strenuously to the inclusion in Respondents' brief of their Appendix "B", a purported "Summary of the Facts", containing an additional eight (8) pages of description of materials contained in their Motion to Augment Record. The inclusion of such materials amounts to an evasion of this Court's Order of October 3, 1980, permitting the Respondent to file a brief not to exceed sixty (60) pages. The materials contained in the brief, not counting the Summary of the Facts found in Appendix "B", was sixty (60) pages alone, and with Appendix constituted sixty-eight (68) pages.

Furthermore, those same materials, and any reference thereto, were stricken from the appellate record by the Court of Appeal of the State of California, by virtue of its Order of January 10, 1979, in response to a Motion to Strike by Petitioners. App. "A'" herein.

B. Respondents' Defense of "Operational Necessity" Was Not Established, Does Not Meet The Standards Of Strict Scrutiny, and in Fact Will Only Encourage Racial Polarization and Stereotyping in Our Society

Once again, the substantial evidence rule and the findings of the Trial Court preclude Respondents from contending that the alleged "operational necessity" of reducing violence in the prisons justifies their practices. Experts having prior access to the myriad of materials cited by Respondents here did testify at trial.[7] There was substantial, indeed overwhelming, evidence presented to show that the ability of correctional officers to relate to or establish rapport with inmates, and thus potentially to reduce violence, varies with the individual, and is not determined by the race or sex of the correctional officer or inmates involved. E.g., R.T. 754-757. Respondents never even attempted to demonstrate that there were insufficient numbers of correctional officers of all sexes and races, in all facilities, to serve the needs described in the sociological arguments found at pages 43-50 in their brief—even were one to assume such arguments to be valid.

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[7]By their use of the various sociological articles and treatises cited in the above-mentioned portion of their brief, Respondents attempt to introduce into the record here the sort of materials upon which their, and Petitioners', experts, can and should have been questioned and cross-examined in the trial court. The materials clearly are not sufficiently "indisputable" to allow the Court to take judicial notice thereof. *Hawkins v. U.S.*, 350 U.S. 74 (1958). Books, treatises, and general publications cited by the Respondents, with respect to the alleged effects of the use of race and sex in employment levels and reducing violence in the prisons and in fostering inmate rehabilitation, were in fact hotly disputed by the Petitioners in the trial court, and were rejected by that Court.

This is the second attempt by Respondents to introduce into the appellate record evidence in support of their "operational necessity" defense. The first attempt resulted in the Court of Appeal striking from the appellate record such sociological theories not discussed or relied upon by experts in the trial court. The text of the Order

In fact, these arguments are without merit, as the briefs of various *amici* demonstrate. With the salient exception of the New York State Department of Correctional Services and the City of Detroit, the numerous friends whom Respondents found among the *amici curiae* promptly develop a case of "constitutional cold feet" when it comes to the Respondents' defense of "operational necessity." Both the AFL-CIO and EEOC point out the incredible dangers of accepting the "operational necessity" defense. See AFL-CIO brief, pages 26-29, and brief of USA and EEOC, pages 26-29. Those *amici* express the same grave concerns urged by Petitioners at all levels of this litigation that the practices engaged in here, having no nexus with remedial action but intended simply to mirror a "service population," will only perpetuate the sorts of racial and sexual prejudices, stereotypes, and divisions that have so plagued our society to date.

C. Respondents Have Failed to Show That There Were No Other Alternatives to Achieve a Higher Percentage of Minorities or Women in the Work Force, Even Were That a Proper State Objective

In their brief, at pages 51-56, Respondents ignore Petitioners' contention that Respondents failed to show there were no less intrusive means to increase the percentages of minorities and women in the correctional work force, assuming this to be a necessary and legitimate State objective. Energetic recruitment, temporary training appointments, and a myriad of other racially and sexually neutral policies described in some detail in those portions of the AAP not challenged may well have, without preferential practices, achieved an increase in minority and female representation at all levels in the Department. Please note the absence of contrary evidence in Resp. Br. pp. 55-56. Under

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of the Court of Appeal of January 10, 1979 is found in Appendix "A" to this Brief.

strict scrutiny standards, Respondents had the burden of making such a showing, and a heavy one, at that.[8]

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS A FINAL JUDGMENT

Whether the California Court of Appeal Decision is final under California law is not relevant. The issue is whether the Decision is appealable and final under federal law. The California Court of Appeal, while ignoring the substantial evidence test, definitely ruled that the Respondents use of racial and sex-based preferences are justified by the compelling state interest of maintaining a safe and efficient correctional system.[9]

In the event of retrial, no *post hoc* justifications need be offered by Respondents for the adoption and implementation of their AAP since the Trial Court will be

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[8]Indeed, the majority of Respondents' brief here is devoted to invoking the reasoning of *Fullilove* as to the protections of "administrative oversight," suggesting that there are means by which Caucasian or male correctional officers can appeal or protest discrimination practiced against them. Thus, at pages 52-54 of their brief, Respondents suggest that a Causasian or male officer may appeal to the State Personnel Board. However, the record is replete with examples of the SPB rejecting such grievances even where the written responses by Department officials acknowledged that they were saving positions for minorities or women. See, for example, Exhibits 1-4 in the court below, wherein the SPB denied the grievance of plaintiff Minnick, even though the Department acknowledged "We are attempting at this time to fill the CPS II position with a qualified minority or female." [Exhibit I] That sort of "administrative oversight" hardly meets the strict standards articulated by this Court in *Fullilove*. Assigning the SPB to police the sort of preferential practices engaged in here is like sending the goat to guard the cabbage.

[9]". . . the practices applied the prison-related realities of race and sex to the point of prompting a 'compelling state interest' in a safe and efficient correctional system." Pet. App. A-15-16.

bound to uphold the use of racial preferences based upon the purported "operational needs" of the Respondents. Under California law, the principle of "law of the case" is definitive.

> "Where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular . . . Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important." *Tally v. Ganahl,* 151 Cal. 418, 421 [1907].[10]

Thus, there is no evidence which Petitioners could introduce to the Trial Court to overturn the law of the case upholding the constitutionality of the racial and sex-based preferences granted. This constitutes the "practical finality" which this Court has denominated as sufficient for United Supreme Court jurisdiction over state court judgments:

> "Today the test is not whether under local rules of practice the judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547 (1947).

To give the Respondents the opportunity to advance additional *post hoc* justifications for their preferential em-

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[10]See also *Pigeon Point Ranch v. Perot,* 59 Cal.2d 227, 232 (1963); *People v. Durbin,* 64 Cal.2d 474, 477 (1966).

ployment practices will not effect the outcome of the state court proceedings, which have been preordained by the resolution of the federal issue. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975), and *Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963). The requisite finality is satisfied where federal rights asserted are disposed of, notwithstanding the remand for further proceedings or re-trial. *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 562 (1914); *Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 386 (1964); and *Cox Broadcasting Corp. v. Cohn, supra.*[11]

PETITIONERS HAVE STANDING IN THIS COURT

The Trial Court made numerous findings (all supported by substantial evidence) that Petitioner California Correctional Officers Association adequately represented the interests of its members who had been and would be affected by Respondents' discriminatory practices, and that the individual Petitioners Minnick and Darden had been discriminated against by such practices and would

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[11]The United States and the Equal Employment Opportunity Commission attempt to limit the holding of *Cox* to situations in which further proceedings in state court are on non-federal issues. (Brief at p. 8). In fact, *Cox* stands for the proposition that where there is finality of judgment with respect to a federal issue, ***even though*** there are state law issues unresolved, the requisite finality exists for the purposes of U.S. Supreme Court jurisdiction. 420 U.S. at 485. In *Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 386 (1964), the Court noted that despite the fact that separate and unresolved issues were pending in the Ohio Court subject to "further proceedings", it "does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or un-appealable within the meaning of 28 U.S.C. § 1257." Id. at 389, fn. 4. There is no conceivable exception to the rule, especially where, as here, the decision was based solely on federal law, and there are no adequate and independent state grounds.

be affected in the future by the implementation of the Respondents' AAP with respect to job opportunities. (Findings of Fact, Nos. 3, 10, 12, 14, 15; Pet.App.F-3 through 5.) As set forth in the Petition at p. 9, although the Petitioners conceded at trial that Minnick and Darden would not be entitled to monetary damages, it was stipulated by all parties at trial and ordered by the Court (C.T. 1194), that their standing *and* that of CCOA would not be affected with respect to prospective and injunctive relief. As the record reflected, there were correctional officers who were certifiable within the "Rule of Three" who had been denied promotion and who had testified that they were willing to be amended into the action as Plaintiffs. R.T. 7-14. At any point before entry of Judgment, they could have been added to the case as plaintiffs. It is for this reason that the Respondents have never themselves raised the issue of standing at any level of these proceedings.

It is apparent that CCOA alone had sufficient legal standing to sue on behalf of its members, who "have been, or are being, or will be disadvantaged" by the Respondents' discriminatory practices (Finding of Fact No. 3), under both Federal and California law. *Professional Firefighters Inc. v. City of Los Angeles*, 60 Cal.2d 276 (1963); *IAFF v. City of Palo Alto*, 60 Cal.2d 295 (1963); *Allee v. Medrano*, 416 U.S. 802 (1974); *Warth v. Seldin*, 422 U.S. 490 (1975). Thus, in *Warth v. Seldin, supra*, this Court stated as follows:

> "The association must allege that its members *or any one of them*, is suffering immediate or *threatened injury* as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." 422 U.S. 490, 511. [Emphasis added.]

Additionally, although the individual Plaintiffs-Petitioners were held to have been injured by and subject to future discrimination by Respondents' practices, even if they had not been, it was within the sound discretion of the Trial Court to determine whether or not the Plaintiffs could still adequately represent the class. See *LaSalla v. American Savings & Loan Association*, 5 Cal.3d 864, 871 (1971), where the California Supreme Court cited various California, as well as federal, cases to support this proposition, including *Buckner v. County School Board of Greene County, Virginia,* 332 Fed.2d 452 (4th Cir. 1964) and *In Re William M.,* 3 Cal.3d 16, 23-24 (1970). Under California law, if the Court concludes that named plaintiffs cannot adequately represent the class, "it should afford them an opportunity to amend their complaint to re-define the class or to add new individual plaintiffs." *Scott v. City of Indian Wells,* 6 Cal.3d 541, 550 (1972).

STATE COURTS HAVE CONCURRENT JURISDICTION OVER TITLE VII ACTIONS

Respondents, joined by numerous *amici curiae* anxious to avoid a resolution on the record and on the merits, contend that jurisdiction over Title VII actions is lodged solely in the United States District Courts. The EEOC itself admits ". . . the question is not without difficulty. . . ." EEOC and USA brief at page 15. Indeed, the EEOC candidly acknowledges that it previously has filed a brief as an *amicus curiae* urging concurrent jurisdiction. Fn. 9 of EEOC brief, at page 15. Furthermore, as the EEOC again recognizes, since 1977 its "right to sue letters" have deleted any reference to the right to sue ". . . in the appropriate United States District Court. . . ." *Id.* This is surely the reddest of the herrings contained in the briefs of Respondents and their supporting *amici*, since, if the State court had no Title VII jurisdiction, then the Court of

Appeal judgment is all the more final and the constitutional claim all the more clearly before this Court.

The State courts, if they are willing to accept it, can and should have concurrent jurisdiction. Thus, in the seminal case of *Claflin v. Houseman,* 93 U.S. 130 (1876), the Court stated the general rule that concurrent jurisdiction is affirmed "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." 93 U.S. 130, at 136. See also *Dowd Box Company v. Courtney,* 368 U.S. 502 (1962) (Section 301 suits under Labor Management Relations Act of 1947); *Safe Workers' Organization v. Ballinger,* 389 F.Supp. 903 (S.D., Ohio 1974) ("Bill of Rights" suit under LMRDA); *Testa v. Catt,* 330 U.S. 386 (1947) (Emergency Price Control Act); and M. Redish & S. Muench, *Adjudication of Federal Causes of Action in State Court,* 75 Mich. L.Rev. 311 (1976).

In California the situation is unequivocally clear that both the California legislature and the California judiciary are willing to enforce in California courts, as a matter of concurrent jurisdiction, Title VII claims. Thus, California Government Code § 19702.1 reads as follows:

> "Hiring and promotion pursuant to this part shall conform to the Federal Civil Rights Act of 1964." (Page A-1 of Appendix To Respondents' Brief).

The California Supreme Court has imposed upon the lower courts of California, as a matter of "comity," the absolute obligation to entertain wholly federal causes of action arising under the Civil Rights Act of 1864 (42 U.S.C. §§ 1981, *et seq.*). *Brown v. Pitchess,* 13 Cal.3d 518 (1975). More significantly, for our purposes, the California Supreme Court in *Price v. Civil Service Commission,*

26 Cal.3d 257 (1980), *cert. denied,* ..... U.S. ..... (1980), clearly indicated its acceptance of concurrent jurisdiction under Title VII.

The alleged procedural problems described by Respondents and their *amici* do not exist under Title VII procedures, either with regard to conciliation efforts or proceeding in State courts once a "right to sue" letter has been received. Exclusive, as opposed to concurrent, jurisdiction in the federal courts will only result in a deluge of litigation there, or multiplicity of actions in both federal and state courts.

THE GUIDELINES OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA) NEITHER REQUIRE, NOR PERMIT, A SPECIFIED LEVEL OF MINORITY EMPLOYMENT

Several *amici* advance the contention that all the Respondents were doing was complying with LEAA guidelines. However, as noted by the EEOC and USA, at page 29 of their brief, the LEAA guidelines neither require, nor permit, either a quota or the seventy percent "mirroring" requirement which the Department adopted. The same brief (p. 29, fn. 25) neatly eviscerates that contention, and we respectfully refer the Court to that footnote, while pointing out that the Solicitor General concludes that ". . . it is the considered judgment of the LEAA that an institution's operational needs do not in general require a percentage of minorities in the work force mirroring that in the inmate population." P. 30, fn. 25.[12]

[12]That position is, of course, required by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §§ 3701 *et seq.*, which specifically precludes the conditioning of funds upon the implementation of a ratio or quota system. Thus, 42 U.S.C. § 3766(b) reads as follows:

Moreover, as the Solicitor General points out, not only have the LEAA guidelines never required the 70% "mirroring" adopted by the Department, but in 1977 the LEAA deleted the "service population" as the benchmark for determining when compliance reviews of recipient agencies would be conducted, substituting instead the "relevant labor market." See brief of EEOC and USA, p. 29, fn. 25.

CONCLUSION

For all of the foregoing reasons, Petitioners request that the judgment of the Court of Appeal of the State of California be reversed, with instructions to reinstate the JUDGMENT and PERMANENT INJUNCTION of the Trial Court.

Dated: November 24, 1980.

Respectfully submitted,

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Attorneys for Petitioners

(Appendix follows)

"Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program."

Appendix

No. 42545

Court of Appeal of the State of California
in and for the
First Appellate District

Division Four

Wayne Minnick, et al.,
Plaintiffs and Respondents,
vs.
California Department of Corrections, et al.,
Defendants and Appellants.

[Filed Jan. 10, 1979]

BY THE COURT:

The motion to strike portions of appellants' opening brief is granted. Those portions of said brief making reference to newspaper articles, books or treatises, which in no way were part of the record in the trial court and additionally were not cited or relied upon by any of the experts called by the parties, and any and all mention of documents submitted in the Motion to Augment Record filed in the trial court, is ordered stricken.

The designation of all such newspaper articles, books and treatises is attached hereto and made a part of this order.

Dated January 10, 1979

Caldecott, P.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1213

WAYNE MINNICK, *et al.*,

Petitioners,

—v.—

CALIFORNIA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF SOUTHERN CALIFORNIA, and ACLU OF NORTHERN CALIFORNIA, *AMICI CURIAE*

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INTEREST OF THE AMICI*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to protecting the fundamental rights of the people of the United States. The ACLU of Southern California and the ACLU of Northern California are regional affiliates of the American Civil Liberties Union.

For nearly a decade, the governing bodies of the ACLU have vigorously debated the equal protection principles underlying "color blind" and "gender blind" standards, on one hand, and race and gender conscious affirmative action, on the other. After each debate, the ACLU has reaffirmed its commitment to the need for eradicating the cumulative effects of societal discrimination against minorities and women through the use of race and gender conscious affirmative action.

The most recently amended ACLU policy on this issue recognizes at the outset that "every individual should enjoy equal access to employment opportunities and to the means of self-advancement without invidious discrimination." The policy also recognizes, in view of this

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

nation's history of discrimination, that race and gender conscious affirmative action is not invidious discrimination:

> However, when discrimination -- and particularly discrimination in employment and education -- has been long and widely practiced against particular groups, it cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color-blind,' or 'sex-blind' standards for selection, promotion, or retention of the applicants and candidates for available jobs or educational programs. Equal treatment in a context of unequal circumstances serves only to perpetuate inequity, and compensatory justice may therefore be essential to achieving equal justice....
>
> * * *
>
> We reaffirm the continuing need for vigorous efforts to redress the adverse effects of racism and sexism and other forms of invidious discrimination in American society....
>
> * * *
>
> We also support the voluntary use of numerical remedies* when there is a reasonable basis for a determination that such remedies are reasonable in

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* ACLU policy defines "numerical remedies," as "the adoption of a number which an employer, school, etc., commits itself to meet, and must meet unless it demonstrates that it could not meet the number through all reasonable good faith efforts to do so."

> relation to the problem of current disadvantage caused by discrimination, whether specific or societal.
>
> * * *
>
> When numerical remedies are used, the standard for inclusion of members of the affected group in the eligible pool should be the capacity to perform at a level of basic competence. Such qualified members of the affected group should then be admitted or hired in preference to other applicants of the group that has benefitted from previous preference and who may be higher on whatever ranking system is otherwise being used. We recognize that individuals from previously preferred groups may lose that advantage, thus excluding individuals otherwise qualified. This is inevitable in any serious effort to redress grievous past injustice.
>
> * * *
>
> A finding of discrimination in an individual or particular institution need not be required because the society's discrimination has, historically, been intensive, pervasive, and continuous....

Pursuant to earlier ACLU policies to this same effect, the ACLU, amicus curiae, filed briefs in this Court supporting the constitutionality and legality of the race conscious, sixteen percent set aside special admissions program at issue in Regents of the University of California v. Bakke, 438 U.S. 265 (1978); supporting the legality of the race conscious

one-to-one training and employment plan upheld in United Steelworkers of America v. Weber, 443 U.S. 193 (1979); and supporting the constitutionality of the Public Works Employment Act's race conscious ten percent set aside upheld in Fullilove v. Klutznick, 65 L. Ed.2d 902 (1980).

Because of our policies, and because we believe that the race and gender conscious plan at issue in the instant case is lawful and constitutional under this Court's teachings in Bakke, Weber and Fullilove, we urge this Court to affirm the decision of the California Court of Appeals and to uphold this race and gender conscious plan.

SUMMARY OF ARGUMENT

This Court's decisions in Bakke, Weber, and Fullilove establish the validity of Respondents' race and gender conscious affirmative action plan under Title VII and under the Fourteenth Amendment.

The legality of this plan under Title VII is established by this Court's decision in Weber, and by the legislative history of the 1972 amendments to Title VII. This legislative history, which was not addressed in Weber, conclusively reveals Congress' intent in favor of race and gender conscious numerical measures.

Respondents' plan is constitutional under the Fourteenth Amendment because it meets the "substantial relationship" test applied in Bakke by Justices Brennan, White, Marshall and Blackmun, as well as the "close examination" test applied in Fullilove by Chief Justice Burger. Even the "strict scrutiny" standard applied to remedial classifications by Justice Powell is satisfied here, as Respondents' plan is premised on extensive legislative and administrative identifications of past discrimination.

ARGUMENT

I. THE CALIFORNIA DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN IS LAWFUL UNDER TITLE VII

A. This Court's Decision in Weber Conclusively Establishes the Legality of this Race and Gender Conscious Plan

In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), this Court held that the affirmative action plan at issue there -- a plan which set a minority employment goal of 39% based on labor market statistics, which was implemented by a one-to-one hiring ratio, and which was expected to be in place well past the year 2000 -- "falls on the permissible side of the line" and thus was lawful under Title VII. 443 U.S. at 208. A fortiori, the affirmative

action plan at issue here -- a plan which sets employment goals based on labor market and inmate statistics, which is implemented only by good faith efforts to meet the goals, and which is of limited duration of only five years -- also falls on the permissible side of the line and hence is lawful.

Apart from the obvious differences in the goals, implementation and duration, there are only two pertinent differences between the plan at issue here and the one approved in Weber. First, this plan establishes employment goals for women not just for imnorities. Second, the plan was adopted by a governmental employer not a private employer. That these differences are without any legal significance was established in Dothard v. Rawlinson, 433 U.S. 321 (1977), where this Court expressly applied general Title VII principles to a case involving gender discrimination and further held that Congress intended "Title VII principles to be applied to governmental and private employers alike." 433 U.S. at 331 n.14.[1/] In

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[1/] The suggestion in the Brief for Petitioners at p.34 that the standards governing unlawful discrimination under Title VII are different for public as opposed to private entities finds no support in Title VII's legislative history; was rejected by this Court in Dothard v. Rawlinson, 433 U.S. 321 (1977); and has been

[footnote continued on page 7]

short, the plan at issue here is lawful for precisely the same reasons that this Court approved the plan in Weber.

B. The 1972 Amendments to Title VII Further Establish the Legality of this Affirmative Action Plan

Although this Court in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), based its decision on the original 1964 legislative history of Title VII, the Weber decision is even more conclusively supported by the legislative history of the 1972 amendments to Title VII. This more recent legislative history similarly establishes the legality of the affirmative action plan here.

As this Court pointed out in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), the "dominant Title VII battle in the 92nd Congress was over what kind of additional enforcement power should be granted to the EEOC." 432 U.S. at 361. Since part of

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[footnote continued from previous page]

rejected by every court of appeals that has faced the issue, e.g., United States v. Virginia, 620 F.2d 1018 (4th Cir. 1980); Scott v. Anniston, 597 F.2d 897 (5th Cir. 1979); Blake v. Los Angeles, 595 F.2d 1367 (9th Cir. 1979); United States v. Chicago, 573 F.2d 446 (7th Cir. 1978); Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir.), cert. denied, 434 U.S. 819 (1977).

that battle concerned the potential transfer of Executive Order 11246 enforcement powers to the EEOC, there was considerable debate on the appropriateness of race and gender conscious numerical measures. Both in the House,[2/] and primarily in the Senate, the use of such measures was approved.

Debate in the Senate focused on two amendments proposed by Senator Ervin. The first amendment barred the use of "fixed or variable numbers, proportions, percentages, quotas, goals, or ranges" based on race or sex. 118 Cong. Rec. 1662 (1972). In Senator Ervin's words, his proposed amendment "forbids discrimination in reverse." 118 Cong. Rec. 1663 (1972).

Among the opponents of Senator Ervin's first amendment was Senator Javits, who spoke at length in favor of race and gender conscious numerical measures. 118 Cong. Rec. 1664-1676 (1972). In support of his position, Senator Javits spoke approvingly of the

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[2/] Debate in the House centered on an amendment, offered by Representative Dent, which would have prohibited the use of quotas or preferential treatment. 117 Cong. Rec. 31784, 31975-31981, 31984 (1971). A substitute amendment directly opposing the Dent amendment was adopted by the House. 117 Cong. Rec. 32089, 32111-32112 (1971).

numerical measures upheld in Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), and in United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971), see 118 Cong. Rec. 1664-1665 (1972), and inserted into the Congressional Record copies of the courts of appeals' decisions in those cases, see 118 Cong. Rec. 1665-1675 (1972). Significantly, Senator Javits also spoke approvingly of the use of numerical hiring measures adopted voluntarily by employers in consent decrees, see 118 Cong. Rec. 1675 (1972), and inserted into the Congressional Record a copy of a report summarizing two voluntarily adopted numerical measures, see 118 Cong. Rec. 1675-1676 (1972). On a vote of 22 yeas, 44 nays, 34 not voting, the first Ervin amendment was defeated. 118 Cong. Rec. 1676 (1972).

Undaunted, Senator Ervin next introduced a similar amendment. 118 Cong. Rec. 4917-4918 (1972). Senator Javits objected to the amendment on the grounds that the Senate had already decided the issue: "we voted on that here; we debated it and we decided it." 118 Cong. Rec. 4918 (1972). In response, Senator Ervin admitted that the "same question is

involved." 118 Cong. Rec. 4918 (1972). Nonetheless, Senator Ervin added: "I sincerely hope that the Senate will agree to the amendment." 118 Cong. Rec. 4917 (1972). It did not. Senator Ervin's second amendment was defeated even more convincingly than his first amendment: 30 yeas, 60 nays, 10 not voting. 118 Cong. Rec. 4918 (1972).

II. THE CALIFORNIA DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN IS CONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT

A. The Affirmative Action Plan Satisfies the Substantial Relationship Test, for the Plan Remedies Past Societal Discrimination Against Minorities and Women

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four of the five members of this Court who addressed the constitutional issue -- Justices Brennan, White, Marshall and Blackmun -- upheld the rigid sixteen percent set aside for minority applicants because it fulfilled the "articulated purpose of remedying the effects of past societal discrimination," the effects of which were manifested in substantial and chronic minority underrepresentation. 438 U.S. at 362. That articulated purpose, the four Justices held, satisfied the substantial relationship

test -- which the Court "developed in gender-discrimination cases" and which also is applicable to remedial racial classifications -- as it served "important governmental objectives" and was "substantially related to those objectives." 438 U.S. at 359, quoting from Califano v. Webster, 430 U.S. 313, 317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976).

Although no fifth member of this Court has yet precisely held that the substantial relationship test is applicable to remedial racial classifications, Chief Justice Burger in his plurality opinion in Fullilove v. Klutznick, 65 L. Ed.2d 902 (1980), declined to apply the more stringent strict scrutiny standard which can be satisfied only by a compelling state interest. Instead, the Chief Justice held that a remedial racial classification only "calls for close examination," 65 L. Ed.2d at 920, a standard not unlike that adopted by Justices Brennan, White, Marshall and Blackmun in Bakke.[3/]

[3/] Although Justice Powell joined in the Chief Justice's plurality opinion in Fullilove, he nevertheless disassociated himself from the "close examination" standard of review adopted by the Chief Justice. In a separate concurring opinion, Justice Powell restated his position in Bakke: a remedial racial classification "is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest." 65 L. Ed.2d at 935.

Not only is the substantial relationship test appropriate here, but the race and gender conscious goals at issue unquestionably satisfy that test. First, at this stage of constitutional history, there is no question that the substantial relationship test applies to a gender conscious remedial classification.[4/] For the reasons stated by Justice Brennan in Bakke, the same standard must govern the race conscious goals at issue here.[5/]

[4/] Amici do not suggest that the substantial relationship test should be applied to gender discrimination, for we have consistently urged this Court to recognize that practices which discriminate against women should be governed by the strict scrutiny standard of review. See Frontiero v. Richardson, 411 U.S. 677 (1973). Although we continue to assert this proposition, we recognize that our view has not yet been adopted by more than four members of this Court, id., and that the Court has apparently settled on the lesser, substantial relationship standard of review for the time being. Califano v. Webster, 430 U.S. 313, 317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976).

[5/] This is particularly appropriate in an employment setting where this Court has already recognized that "classifications based on gender, not unlike those based on race, have traditionally been the touchstone for pervasive and often subtle discrimination." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

Second, since the rigid set asides in Bakke and Fullilove were found to satisfy the substantial relationship test -- or the "close examination" test -- the more lenient, good faith goals at issue here a fortiori satisfy those tests. They too serve the important governmental objectives of remedying the effects of past societal discrimination, and are substantially related to accomplishing those objectives.

B. The Affirmative Action Plan Satisfies the Compelling State Interest Test, for it Remedies Identified Past Discrimination

Not only do the race and gender conscious goals satisfy the substantial relationship test but they also satisfy the compelling state interest test deemed applicable to remedial racial classifications by Justice Powell both in Regents of the University of California v. Bakke, 438 U.S. 265, 287-315 (1978), and in Fullilove v. Klutznick, 65 L. Ed.2d 902, 935-947 (1980).

Satisfaction of this strict scrutiny test, Justice Powell held in both cases, occurs where the remedial racial classification is premised upon legislatively or administratively

identified past discrimination.[6/] When such an identification is made, a responsive remedial classification is constitutional -- as Justice Powell held in Fullilove -- because governments have an undeniable and overriding "interest in ameliorating the disabling effects of identified discrimination." 65 L. Ed.2d at 936.

6/ The identification in fact need not be of past discrimination but instead may be only of underrepresentation. This point was illustrated in Bakke by Justice Powell's approval of South Carolina v. Katzenbach, 383 U.S. 301 (1966), upholding a remedial racial classification premised only on scant legislative references to electorate underrepresentation of minorities; and by Justice Powell's similar approval of Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), and Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), both upholding remedial racial classifications premised only on administrative identifications of minority underrepresentation in the skilled building trades. See 438 U.S. at 301-302, 301 n.41.

Better illustrating this point is Justice Powell's opinion in Fullilove in which he upheld the ten percent set aside for minority contractors premised almost exclusively on several federal agency reports and one congressional committee report indicating underrepresentation in government contracting of minority contractors. See 65 L. Ed.2d 939-942.

The remedial classifications at issue here are premised on legislatively and administratively identified past discrimination similar to yet even stronger than the identifications relied on in Fullilove. As is set forth at some length in the Brief for Respondents, identifications of severe underrepresentation and past discrimination supporting the remedial classifications here were made by Congress in 1972 when it amended Title VII to cover state and local governments, by Congress in 1973 and again in 1976 when it amended and strengthened the Crime Control Act's nondiscrimination provisions, by the U.S. Commission on Civil Rights prior thereto in 1969 and 1970, by the California Assembly in 1971 and by the California Legislature in 1972 and 1977, by the Governor of California in 1971 and 1974, and frequently by the Respondent California Department of Corrections itself. In fact, as also is explained in the Brief for Respondents, the Respondents in the trial court below sought to concede and document their own past discrimination.

The identifications here -- indeed, the findings and attempted admissions here -- are more than adequate to support the good faith goals adopted by the Respondents in pursuit of

the constitutionally permissible objective of ameliorating the disabling effects of identified discrimination.

CONCLUSION

Since Respondents' remedial affirmative action plan is both lawful under Title VII and constitutional under the Fourteen Amendment, the decision of the California Court of Appeals should be affirmed.

Dated: October 17, 1980

Respectively submitted,

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Supreme Court, U. S.
FILED
OCT 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

In the

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WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,

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v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae

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CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae

The American Federation of Labor and Congress of Industrial Organization, a federation of 104 national and international unions with a total membership of 13,500,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The argument that follows is addressed to the passive virtues. Questions concerning the legality of race and sex conscious "affirmative action" policies are difficult and sensitive. Particularly, at the formative stage in the development of this body of law it is essential that the Court ad-

dress those questions in cases in which the record is certain and complete and this Court's answer will settle the underlying dispute. Neither of these traditional safeguards for considered decisionmaking is present here.

As we show in point I of our argument, there is no final judgment in this case for this Court to review; the Court therefore is without jurisdiction to decide the case. The California Court of Appeals remanded the case for a new trial in a context in which that trial could, even if this Court on the present record should determine that the challenged program is lawful, reach an opposite result based on additional facts.

And precisely because this case was tried before this Court's "affirmative action" decisions beginning with *United Jewish Organizations* v. *Carey*, 430 U.S. 144, the record contains little or nothing on many of the factors the Court has evaluated in determining whether a race-conscious program is lawful. Possibly that is why the court below permitted a new trial. That step was the state court's prerogative, but the lack of a solid record calls for this Court to dismiss the writ of *certiorari* as improvidentally granted.

Finally in point I, it is our submission that the state court did not have jurisdiction of the Title VII claim presented here. As we show, the language, the structure and the legislative history of the Civil Rights Act of 1964 and of the Equal Employment Opportunity Act of 1972 make it manifest that Congress intended to vest the federal courts with exclusive jurisdiction over Title VII claims. Thus, the Title VII question presented, which is substantial, is not properly before the Court for decision on the merits. The proper course of decision is to reach constitutional claims only after it is plain that the threshold statutory claims

are unsound. That course being closed off is an additional ground for dismissing the writ.

Given the nature of the last of the grounds we advance for not deciding this case, it is incumbent on us to show that the Title VII claim is indeed substantial and could control the disposition of this case. We seek to meet that obligation in point II of our argument. In deciding the Title VII question, the California Court of Appeal relied on *Steelworkers v. Weber,* 443 U.S. 193. The aspect of the program having to do with female employees follows the general outline of the USWA-Kaiser affirmative action plan. But, on the inadequate record here it is impossible to tell whether the Department's program meets the criteria of legality stated in *Weber, id.* at 208-209. The aspect of the program having to do with minority employees stands on a different footing. Its purpose as stated by the Court of Appeal is not to "abolish traditional patterns of racial segregation and hierarchy" (*id.* at 204) but to "promote the compelling interest of this State in the proper management of its correctional system." (Pet. App. A-17). That purpose is not consistent with the Act's overall purpose as delineated in *Weber* or with § 703(j), the provision relied on in *Weber.* Indeed, § 703(e)(1) which establishes a defense for employers based on operational needs to a claim of "sex", "religion", or "national origin" discrimination does not make such an exception for "race" or "color." While § 703 was shaped in 1964 when the Act covered only private employees, Congress' intent in 1972, when Title VII was extended to cover public employees, was to apply the same Title VII principle to all employers. (*Dothard v. Rawlinson,* 433 U.S. 321, 331-332, n. 14.) The sole relaxation of that approach is the exception in § 701 (f) narrowing the class of federal employees covered by the Act. Thus, there

are substantial reasons for believing that if the Title VII question were before the Court it would be determinative.

Finally, in point III we address the Constitutional issue tendered by petitioners. The so-called "affirmative action" cases this Court has previously measured against the Constitution all involved programs or plans which in one way or another were meant to end the racial divisions that exist in our society. In contrast, the "operational needs" justification offered in this case is not premised upon a design to redress racial division. Rather, it is built upon the reality that a significant degree of racial polarization remains in our society.

The dilemma that rationale presents is, we submit, particularly difficult to resolve. On the one hand, it cannot be denied that there are instances where the present state of racial division in this country poses a significant obstacle to the achievement of important governmental objectives. On the other hand, to accept that the racially-based "perceptions" of one group or another may dictate public policy is in part to validate those perceptions.

It is important to recognize in this connection that the "operational needs" justification, based as it is on "public perceptions," is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations where an advantage accrues only to some disadvantaged minority. Moreover, the "operational needs" justification has potential application to virtually every facet of government activity.

A question of this nature should not be addressed in a case such as this where the record does not frame the relevant considerations in bold relief, and the statutory avenues for resolution of the issues have not been exhausted. The writ of *certiorari* should therefore be dismissed.

ARGUMENT

I

A. The California Court of Appeal decided this case in a manner which will permit the parties, upon remand to the trial court, to cure the very evidentiary defects which make it dubious whether the matter is now appropriate for review by this Court on the issues presented. Those defects in themselves counsel the Court in its wise discretion to dismiss the writ of *certiorari* as improvidently granted, as we show in part B, *infra*. But first we demonstrate that because of the lower court's disposition, the judgment below is not final, and this Court lacks jurisdiction under 28 U.S.C. § 1257.

The Court of Appeal's judgment "reversed" the judgment and injunction issued by the Superior Court. (Pet. App. A-24). As this Court recognized in *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, "[i]n California, an unqualified reversal, 'that is to say, without direction to the trial courts,' is effective to remand the case 'for a new trial and places the parties in the same position as if the case had never been tried.' " (*Id.*, at 546) This rule of state practice has been clarified somewhat in the years since *Gospel Army* to make clear that the rule is not "a fetish of form" (*Stromer* v. *Browning*, 268 C.A.2d 513, 519), and that "a case [may] be set at large for retrial only when that is the intent of the appellate court." (*Id.*, at 518) But, while "[i]t is not the form of the order on the . . . appeal that controls, but the substance of that order" (*Snapp* v. *State Farm Fire & Gas Co.*, 66 Cal.2d 816, 821), in this instance it is quite clear, since the opinion twice recognized that the case could be retried (Pet.App. A-23, A-24), that the Court of Appeal chose the form of the disposition with care and specifically intended that the "case be set at large for retrial."

It is apparent that at the retrial, the factual record is likely to develop in a manner that may well change the outcome of the case in the California courts with respect to the federal issues. Thus, for example, while petitioners challenged the Department of Corrections' "affirmative action" program with respect to both hiring and promotion, they presented so little evidence on the hiring issue—perhaps because they were already employees of the Department—that the court below was unable to find a single "instance in which [a racial preference] had been exercised in the 'initial hiring' of a new employee." (Pet. App. A-7-A-8). With respect to promotion, while the Court of Appeal premised its decision on the assumption that the program worked not on the basis of rigid racial quotas or set-asides, but on the basis of "noncontrolling preferences" (Pet. App. A-17) —"'plus' factor[s]" (Pet. App. A-6)—petitioners in their brief here point to evidence that positions were set aside as "available for minorities or women only." (Pet. Br. 6; see also *id.*, at 5-9). And, while the Court of Appeal found the Department's preference system justified "because [it is] necessary to promote the compelling interest of this State in the proper management of its correctional system" (Pet. App. A-17), in this Court the Department offers an alternative justification for its program—*viz.*, that it is designed to remedy past discrimination by the Department. After a full new trial, each of these factual issues may be resolved differently than they were below, and the major factual premises for the Court of Appeal's legal rulings on the federal issues would thus be removed.

The Court of Appeal did not explain why it determined to give petitioners a second opportunity to prove facts they had once had a chance to establish. Quite possibly, however, the reason is the one we discuss below—that the case was tried before the relevant legal standards were available

even in vague outline. In effect, the Court of Appeal remanded for new findings of fact in light of this Court's intervening decisions in point. (Cf. Pet. App. A-24). That court's authority to do so as a matter of state procedure is not open to question here; but its exercise of that authority renders its decision non-final for federal purposes.

Given this posture, the present case lacks finality even more clearly than did the similar California disposition in *Gospel Army, supra.* In that case, this Court "dismiss[ed] the appeal *** for jurisdictional reasons" (331 U.S. at 544), explaining that "the effect of the judgment under state practice is to remand the case for a new trial [and] [n]othing in the opinion of the court is to the contrary" (*Id.*, at 548). In *Gospel Army,* the Court stated:

> We cannot assume that the Supreme Court of California would hold the ordinances in question constitutional no matter what facts might be presented upon a second trial. Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation. [*Id.*]

The trend of this Court noted in *Gospel Army* to "become less formal in the matter of final judgments" (*id.*, at 547) has continued apace. (See *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477.) We are aware of no case, however, in which this Court permitted a litigant who has the right to retry the central federal legal theories presented here to have review of a judgment as "final."

B. This case was tried in 1976. At that time, this Court had not decided *any* cases raising challenges to the legality of race, sex or national origin-conscious "affirmative action" policies. The principles now beginning to emerge for distinguishing the valid from the invalid in this area (see *United Jewish Organizations* v. *Carey,* 430 U.S. 144; *Regents of the University of California* v. *Bakke,* 438 U.S. 265;

Steelworkers v. *Weber*, 443 U.S. 193; *Fullilove* v. *Klutznick*, —— U.S. ——, 48 L.W. 4979) did not exist then even in embryonic form.

Given this circumstance, it is not surprising that the facts actually established below ill-suit the molds into which the parties are now seeking to pour them in order to conform to the legal theories of the intervening cases. For example, petitioners' original position was that *any* consideration of race or sex in hiring or promotion is invalid under, *inter alia,* Title VII and the federal Equal Protection Clause. Upon that theory, it made little difference what the objectives of the Department were, or whether the Department set numerical goals for minorities and women with respect to certain personnel decisions but not others. Nor was the precise manner in which any numerical goals were set or implimented of great relevance. At this juncture, however, this Court's decisions indicate that each of these factors is to be taken into account and may well be determinative of the outcome. But, as noted above, the record on these points is incomplete, indeterminant, as the contrasting statements of the facts show, and, under the Court of Appeal's remand to the trial court, subject to further development. That factual development may well dictate the outcome of the case on remand while in the meantime this Court is confronted with what may prove to be a hypothetical case.

In this circumstance it is appropriate to dismiss the writ of *certiorari* as improvidently granted. For when, upon the closer examination than the processes for reviewing petitions for a writ of *certiorari* permit, it develops that the central and seemingly novel issues advanced by the parties are either not presented by the record at all (*Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228) or are presented

in a manner "too opaque to permit any satisfactory adjudication of that question" (*Wainwright* v. *New Orleans,* 392 U.S. 598 (Harlan, J., concurring)), this Court, in pursuit of the principles of selective review which underlie *certiorari* practice generally, has often dismissed the writ even after oral argument. (*See Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 77-79.)

C. Because the issues presented for review include profound constitutional issues which solely because the case was instituted in state court, may not be avoidable through statutory construction, the Court's settled "policy of strict necessity in disposing of constitutional issues" (*Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568) is pertinent here as well.

Petitioners have challenged the Department's race-conscious employment program as violative of Title VII, as well as of the Fourteenth Amendment. As we show in point II, *infra,* there are substantial arguments to be made in support of that statutory claim. The Title VII issue may accordingly be dispositive of the problem presented in this case, and thus obviate the need to decide the Constitutional issue which petitioners pose. In this circumstance it is "incumbent" on the courts to resolve the Title VII issue first. (*New York Transit Authority* v. *Beazer,* 440 U.S. 568, 582-583.)

In our view, however, for a reason addressed neither by the courts below nor in the documents filed in this Court before the writ of *certiorari* was granted, this Court is precluded from deciding the Title VII question: state courts do not have jurisdiction to entertain actions under Title VII and therefore there has never been subject-matter jurisdiction over the Title VII claim in this case.[1]

[1] Since "lack of jurisdiction . . . touching the subject matter of

Ordinarily state courts have the power concurrently with federal courts to enforce federally-created rights. (*Clafin* v. *Houseman*, 93 U.S. 130.) However, Congress may determine, when it creates a new right under federal law, to confine enforcement of that right to the federal courts. (*Id.*, at 137.) A determination to make federal court jurisdiction exclusive need not be expressly stated in the statute. Rather, there is concurrent jurisdiction only if "exclusive jurisdiction be neither express or *implied.*" (*Id.*, at 136 (emphasis supplied); *see also id.* at 137: "[Federal court] jurisdiction is sometimes exclusive by express enactment and *sometimes by implication.*" (emphasis supplied).) Since implied as well as express exclusivity must be respected, "whether [state courts] possessed [jurisdiction] in a particular case [is] a matter of construction of the Acts relating thereto." (*Id.*, at 140.) In this instance, the structure and language of Title VII so plainly contemplate federal court enforcement alone that the intent to provide only federal court jurisdiction *is* express even though the term "exclusive" is not used.

The scheme for judicial enforcement of rights created by Title VII is set forth in § 706(f)-(k) of the Act, 42 U.S.C. § 2000e-5(f)-(k), and in § 707, 42 U.S.C. § 2000e-6. In particular, the central jurisdictional section, 706(f)(3), provides that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States *shall have* jurisdiction of actions brought under this subchapter." (Emphasis supplied).

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the litigation cannot be waived by the parties," (*United States* v. *Griffin*, 303 U.S. 226, 229), this Court inquires into its own jurisdiction or that of the lower courts even though the jurisdictional issues were not properly raised or decided below. *See, e.g., Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278; *Seaboard Airline R. Co.* v. *Daniel*, 333 U.S. 118, 122.

This Court has on at least one occasion read similar language as sufficiently "express," without more, to mandate exclusive federal jurisdiction. (*Seaboard Air Lines Co.* v. *Daniel,* 333 U.S. 118, 122 (provision stating that district courts "shall have jurisdiction" over actions to review orders of the Interstate Commerce Commission, establishes exclusive jurisdiction).)

In this instance, any possible ambiguity is resolved by other aspects of § 706. For example, § 706(j) provides that "[*a*]*ny* civil action brought under this section . . . shall be subject to appeal as provided in §§ 1291 & 1292, Title 28." (Emphasis supplied). Sections 1291 & 1292, in turn, refer expressly to decisions and orders "of the district courts of the United States," and provide for appeal to federal courts of appeals. There is no sensible construction of § 706(j) which would recognize state court jurisdiction over a Title VII action and still give force to the universal language of the section.

Similarly, §§ 706(f)(4) & (5) contain references which make sense only upon the understanding that federal jurisdiction is exclusive. Thus, § 706(f)(4) provides that "the chief judge *of the district* . . . in which the case is pending [shall] designate a judge . . . to hear and determine the case." (Emphasis supplied). And, the section directs "the chief judge of the circuit" to, in certain circumstances, appoint "a district or circuit judge . . . to determine the case." The "district" and "circuit" judges referred to are *federal* judges; such terminology has no application to the judges of many states. Section 706(f)(5) provides:

> If [a] judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to Rule 53 of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, generally, of course, "govern procedure in the United States district courts" (Rule 1, Fed.R.Civ.Pro.), not in state courts. The references throughout Rule 53 to "the district court" or "the court" are therefore necessarily to the federal district court; for example, it is the "district court" which can appoint a master, and "the court" which fixes the master's compensation. A state court, consequently, could not possibly "appoint a master pursuant to Rule 53."[2]

Further, the venue provisions of the Act, § 706(f)(3), refer to "judicial districts," again a term in general meaningful only with respect to federal courts. And 28 U.S.C. §§ 1404 & 1406, incorporated in § 706(f)(3), are, once again, limited in their application to federal courts. Compare the separate venue provisions applicable to federal and state courts in the statutes construed in *Merchantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, and *Testa* v. *Katt,* 330 U.S. 386.

Thus, while Title VII itself does not in terms state that federal court jurisdiction is "exclusive," the provisions it incorporates *are* expressly limited in their application to federal courts. The intended exclusivity is therefore apparent without need for further inquiry.[3] If further corroboration were needed, however, it may be found in "the particularized history behind the enactment of that provision of the federal . . . law." (*Charles Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 508.)

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[2] For similar reasons, a state court cannot "[grant] preliminary or temporary relief . . . in accordance with Rule 65 of the Federal Rules of Civil Procedure." (§ 706(f)(2).)

[3] Title VII is replete with other procedural instructions regarding court actions. For example: "(t)he court may appoint an attorney . . . and may authorize the commencement of the action without the payment of fees, costs, or security." (§ 706(f)(1)); "(t)he court

In both 1964 and 1972, the original bills before the relevant committees concerning a federal equal employment guarantee provided for cease-and-desist enforcement powers in a federal administrative agency. (*See* H.R. 405, 88th Cong., 1st Sess. (1963); S. 1937, 88th Cong., 1st Sess. (1963); H.R. 1746, 92d Cong., 1st Sess. (1971). The model alluded to in explicating the proposed operation of Title VII with EEOC enforcement authority was the National Labor Relations Act, (*see, e.g.*, H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 9 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 20 (1971)), and, in keeping with that model, review of agency action was expressly lodged in a "United States court of appeals." (H.R. 1746 *supra*, §§ 706(l) & (i).) Clearly, under that scheme there could be no concurrent jurisdiction in the state courts. (Cf. *Garner* v. *Teamsters Union*, 346 U.S. 485.)

The cease-and-desist-power proposal in 1964 failed to reach the floor of either House of Congress. Rather, the House Judiciary Committee, because it preferred that "the ultimate determination of discrimination rest with the Federal Judiciary," substituted an EEOC-initiated lawsuit for

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may . . . permit the Commission or the Attorney General . . . to intervene . . . upon certification that the case is of general public importance." (*id.*); "injunctive suits are to be "assign(ed) for hearing at the earliest possible date and . . . in every way expedited." (§ 706 (f) (2)). Unlike the procedural provisions discussed earlier, these instructions are not in terms applicable only to federal court actions. However, to ascribe to Congress an intent to authorize waiver of state court fees, or to issue orders regarding the expedition of state court lawsuits, would go considerably further in subordinating state court procedures to the federal will than this C ourt has done heretofore. (Compare *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359; *see also, Brown* v. *Gerdes*, 321 U.S. 178, 190 (Frankfurter, J. concurring); *Minneapolis & St. Louis R.R.* v. *Bombolis*, 241 U.S. 211.)

the Commission's cease-and-desist powers.[4] Later, there was a further compromise, removing the EEOC's authority to file suit and substituting private lawsuits.[5] Senator Humphrey, co-manager of the Civil Rights Act in the Senate, explained (1964 Leg. Hist. at 3003-3004):

> Under the House version, if conciliation by the Commission failed, the Commission, if it determined that there was reasonable cause to believe that the respondent had violated the title could bring suit for relief against him in Federal Court. The amendments of our substitute leave the investigation and conciliation functions of the Commission substantially intact. However, if the Commission has not been able to achieve voluntary compliance within 30 days . . . the person aggrieved . . . may bring his own suit in Federal Court.[6]

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[4] H.R. Rep. No. 914, 88th Cong., 1st Sess., reprinted in United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 (hereinafter "1964 Leg. Hist.") at 2150 (separate views of Rep. McCulloch, et al.); *see also* H.R. Rep. No. 1370, 87th Cong., 2d Sess. (1962), 1964 Leg. Hist. at 2160; 1964 Leg. Hist. at 3070-3071 (remarks of Senator Clark).

[5] In the same compromise bill, a provision was added giving the Attorney General authority to bring pattern and practice suits. 1964 Leg. Hist. at 3004. This provision expressly states that such suits are to be brought "in the appropriate district court of the United States." § 707(a), 42 U.S.C. § 2000e-b. Section 707 derived from Title II of the 1964 Act, dealing with public accommodations, and was meant to preserve "[t]he role of the Federal Government in obtaining enforcement of the title through litigation." 1964 Leg. Hist. 3007 (remarks of Senator Humphrey). There is no indication in the legislative materials that this express limitation of pattern and practice suits to federal courts was thought to create a different jurisdictional base for such suits than was applicable to private Title VII actions. If anything, in light of all the legislative history we have discussed, this express reference confirms the understanding of Congress that jurisdiction over all Title VII actions was to be exclusively in the federal courts.

[6] Similarly, there were perhaps dozens of statements by mem-

In 1972, there was a second attempt to provide for EEOC cease-and-desist power. While this attempt failed, the Act was amended, *inter alia*, to permit the EEOC itself to file civil actions. See, for this history, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 362. Once again, the central issue was presented as one of the distribution of enforcement authority *within* the federal government. Thus, the opponents of cease-and-desist authority, who eventually prevailed, argued:

> [T]he most significant issue is what procedures will ensure the most effective enforcement of the substantive provisions of Title VII. [I]n the judicial approach the original finder of fact would be the federal district judge. [T]he district court approach is clearly preferable because relief can be more quickly granted [citing statistics comparing the timeliness of the NLRB with

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bers of Congress during the debate on the enforcement sections of the bill indicating, as Senator Humphrey's had indicated, that enforcement was to be in federal district court. *See, e.g.:* H.R. Rep. No. 914, *supra*, 1964 Leg. Hist., at 210 (minority views of Reps. Poff & Cramer) ("the Commission is required to bring a civil suit in the Federal district court"); 1964 Leg. Hist., at 3009 (remarks of Senator Clark) ("The . . . Equal Employment Opportunity Commission . . . would where necessary [file] suits in the Federal courts to compel compliance with the title"); *id.*, at 3027, comparative analysis by Senator Dirkson and Congressman McCulloch ("the aggrieved party may bring a civil action . . . in a U.S. district court."); *id.*, at 3039, (Clark-Case Interpretative Memorandum) ("[O]rdinarily a suit will be brought in a Federal district court . . . [except that] the Commission may decide not to bring suit . . . [T]he party allegedly discriminated against may . . . bring his own suit in Federal court."); *id.*, at 3088 (Memorandum inserted by Senator Javits) ("H.R. 7152 assigns the adjudicative function to the Federal district courts."); *id.*, at 3258 (remarks of Congressman Ryan) ("the Commission may seek relief in the Federal district court"); *id.*, at 3283 (remarks of Rep. Celler); *id.*, at 3284 (remarks of Rep. Celler); *id.*, at 3286-3287 (memorandum of Senator Case); *id.*, at 3308 (remarks of Senator Yarborough).

> that of the federal courts.] . . . United States district court proceedings provide procedural safeguards; Federal judges are well known in their areas, and enjoy great respect. . . . The Federal Rules of Civil Procedure, with respect to discovery, would greatly facilitate the collection of evidence for trial. . . . [H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 59-62 (Minority Views). *See also, e.g.*, U.S. Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, at 193 (remarks of Rep. Bolling; remarks of Rep. Martin.] [7]

In sum, the language, structure, and history of Title VII lead directly to the conclusion that Congress meant to establish exclusive jurisdiction in the federal courts over Title VII actions.[8] Accordingly, the courts below never had subject-matter jurisdiction over petitioners' Title VII claim, and this Court can not consider the merits of that claim. Because of petitioners' choice of forum then, this Court may have to confront the problem in this case as a Constitutional matter, when it otherwise might well have been—and in other cases could be—resolved on statutory grounds. We urge this Court to avoid such unnecessary Constitutional adjudication by dismissing the writ as improvidently granted.

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[7] With regard to individual causes of action, the 1972 Act continued the right of "the person aggrieved . . . to commence an action . . . in the proper United States district court." H.R. Rep. No. 92-238, *supra*, at 12; *See also, e.g.*, S. Rep. 92-415 *supra*, at 23; 1972 Leg. Hist., at 1837 (Joint Explanatory Statement of Managers At the Conference); *id.*, at 1845 (Senator Williams' Section-by-Section Analysis); *id.* at 1856 (remarks of Rep. Perkins on Conference Report.); *id.*, at 1863 (remarks of Rep. Dent.)

[8] This Court has premised at least one decision on the understanding that federal jurisdiction over Title VII cases is exclusive. In *New York Gaslight Club, Inc.* v. *Carey*, ... U.S. ....., 48 L.W. 4645, the Court was faced with the question whether an individual who had succeeded in obtaining relief in state court under a state

II

The California Court of Appeal disposed of petitioners' Title VII claim as follows (Pet. App. B-2):

> As amended, Title VII . . . prohibits discrimination by an "employer," in any area of nonexcepted employment . . . on the basis of an "individual's race, color, religion, sex, or national origin." . . . The prohibition reaches the Department, a public employer, as well as private employers. . . .
>
> The United States Supreme Court has . . . held, on the basis of the congressional intent underlying the title, that it does not prohibit *private* employers from voluntarily adopting "race-conscious affirmative action plans." (*United Steelworkers of America, AFL-CIO* v. *Weber et al.* (1979) [443 U.S. 193]. . . .) The Department has done precisely that, and the trial court found from substantial evidence that the plan it adopted had partially "motivated" the personnel practices challenged in this action. (See finding no. 8, quoted in fn. 5, *ante.*) The fact that the Department is a public employer suggests no basis for excluding it from the reach of the congressional intent and objectives analyzed in *United Steelworkers.* We accordingly perceive no violation of Title VII in the practices the Department's AAP has "motivated."

The court below was correct in concluding that for purposes of determining the meaning of Title VII's basic prohibition the fact that an employer is "private" or "pub-

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employment discrimination law could recover attorney's fees under Title VII for the state proceedings. The Court concluded that:

> §§ 706(f) and 706(k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII. *Id.* at

In so holding, this Court assumed that such an action could proceed *only* in federal court, for the Court stated, as a premise of its analysis, that but for the availability of a federal forum there could be no recovery of attorney's fees under Title VII.

lic" is irrelevant. As *Dothard* v. *Rawlinson*, 433 U.S. 321, which like this case involved the employment practices of a prison system, noted,

> . . . Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R. Rep. No. 92-238, p. 17 (1971); S. Rep. No. 92-415, p. 10 (1971). [433 U.S. at 331-332, n. 14.]

The legislative judgment to extend to public employers intact the substantive standards originally crafted to govern private employers was made in full awareness that those standards would be applied to the "governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice)"; indeed in Congress' view those were the areas in which the "problem of employment discrimination is particularly acute and has the most deleterious effect." (H.R. Rep. No. 92-238, 92d Cong. 1st Sess., 17. To the same effect see S. Rep. No. 92-415, 92d Cong. 1st Sess., 10.) [9] To the extent that Congress desired a different regime in the public and private sectors that was accomplished in § 701(f) by excluding from coverage:

> [A]ny person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

[9] Since the House and Senate Committee bills that led to the 1972 Title VII amendments were drastically changed through floor action, the Committee Reports are not invariably authoritative. But since the final legislation did incorporate the extension of Title VII jurisdiction to the public sector essentially as proposed that caution does not apply in this instance.

With regard to these exclusions, the joint explanatory statement of managers at the conference states:

> It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not exempted. [S. Rep. No. 92-681, 92d. Cong. 2d Sess., 15-16.]

Section 701(f), then, embodies Congress' judgment of the precise extent to which the inherent functional differences between the public and private sectors should be given weight in developing a comprehensive statutory law of equal employment opportunity. That provision aside, Congress intended that on questions of coverage and legal obligation, private and public employers are to be regarded as a single class.

We believe, however, that the further conclusion of the court below that *Weber* controls the result here is erroneous. To be sure both that case and this one concern what this Court has termed "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin, . . . Undoubtedly [this type of conduct] was the most obvious evil Congress had in mind when it enacted Title VII." (*Teamsters* v. *United States*, 431 U.S. 324, 335, n. 15.) The *Weber* Court of course concluded that there is a category where such conduct is not prohibited by Title VII. As the Court's careful statement of its rationale and holding demonstrates, that category does not extend, as the court below seemed to assume, to all "race-

conscious affiirmative action plans" regardless of purpose or content.

In *Weber,* the Court stated the scope of the matter before it for decision to be (443 U.S. at 200):

> The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. [Emphasis in original.]

The *Weber* Court, in answering that question in the affirmative and rejecting the argument "that Congress intended in Title VII to prohibit all race conscious affirmative action plans," relied on two central components of the legislative record:

First (*id.* at 203, 204),

> [I]t was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.
>
> • • • • •
>
> The very statutory words intended as a spur or catalyst to cause "employers and unions . . . to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.

Second (*id.* at 205-206),

> Opponents of Title VII. . . . argued that the Act would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment

> to racial minorities in order to integrate [, and] they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. . . . [In response] Congress added § 703(j) which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . on account of" a *de facto* racial imbalance in the employer's work force. The section does *not* state that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action. [Footnote omitted.]

Finally, the Court cautioned (*id.* at 208):

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. . . .
>
> At the same time, the plan does not unnecessarily trammel the interests of the white employees. . . . Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

In short, the Court concluded that Congress did not forbid a plan embodying that purpose and respecting those limitations because it constituted a means (albeit one different from the means required by the Act) for advancing toward the Act's ultimate goal.

While the plans at issue in *Weber* and in this case are both labeled with the tag "affirmative action" there are important differences between them. The California Court of Appeal found that (Pet. App. A-5):

> The Department adopted a documented "Affirmative Action Plan" (hereinafter "AAP") . . . [whose] principal objectives . . . include . . . increasing the number of "minority" employees to a level equalling at least 70% of any given "minority" in the inmate population of the Department (i.e., State prisoners).
>
> * * * * *
>
> The AAP indicated, and there was evidence, that the desired "minority" level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system.[10]

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[10] In contrast, the objective of the program here at issue with respect to females is stated in terms of "a percentage level equivalent with that in the total 'California labor force.'" (Pet. App. A-5.) This formulation contrasts with the objective for minority employees which is stated in terms of a "level equalling at least 70% of any 'minority' in the inmate population of the Department (i.e., State prisoners)." (*Ibid.*) This difference appears to reflect a difference in the rationales underlying the two objectives. Whereas the objective for minorities is premised on the "operational needs" of the Department, the objective for females seems to be based on the more traditional "affirmative action" concept of redressing an underrepresentation of a deprived group in a particular work force. Thus, the questions with respect to the program for females are: (1) whether it meets the requirements of Title VII, as set forth in *Weber*, for "voluntary, race-conscious affirmative action plans"; and, if so, (2) whether it passes muster under the Fourteenth Amendment to the Constitution.

In our view, the factual record in this case does not allow for proper treatment of either of these issues. The Court in *Weber* identified a number of factors which were apparently significant in reaching the conclusion that the Kaiser-USWA plan was lawful. 443 U.S. at 208-209. The record here is inadequate for any meaningful analysis of the similarities and differences between the program here respecting females and the program in *Weber*. We do not know precisely how the program here works or what its effects are or have been. See point I, *supra*. *A fortiori* those record deficiencies pretermit any proper analysis of the Constitutional question, even were it possible to reach that question through resolution of the Title VII question in respondents' favor.

In *Weber* the purpose of the employer and the union was to achieve the result that would have occurred in a society free of discrimination—a cross section of employees in the workplace that accords with the general composition of the labor market. Here the employer's purpose in utilizing race-conscious employment criteria is to serve operational needs of the institution. That objective is not sanctioned by the overall purpose of Title VII, as delineated in *Weber,* nor does it find support in Congress' refusal to prohibit race-conscious efforts to "break down old patterns of racial segregation and hierarchy."

With regard to a race-conscious policy to end segregation, a provision elaborating on the basic prohibition stated in the Title (§ 703(j)) pushed toward the conclusion that the policy is lawful. In contrast, with regard to a race-conscious policy to further an employer's operational needs, the provision in Title VII that provides insight into Congress' intent pushes toward the conclusion that the policy is unlawful. Section 703(e)(1) provides:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

This permission for certain religious, sex and national origin-conscious employment policies to meet employers' operational needs is "meant to be an extremely narrow exception to the general prohibition of discrimination. . . ." (*Dothard,* 433 U.S. at 334.) The failure to include "race" and "color" in the exception is conspicuous. It was noticed

by Cong. Williams who offered an amendment to add these classifications to the provision and explained (1964 Leg. Hist. at 3191):

> Mr. Chairman, why should there be discrimination against a Negro savings and loan association, with a provision that it would be compelled to hire white people whether it wished to or not? Why should there be discrimination against a Negro burial association, by telling it that it must hire white salesmen? Why should there be discrimination against a Negro insurance company, by telling it that it must hire white insurance salesmen, when they and all of us here know this would destroy the business completely because it would destroy its identity as a Negro business, the very quality responsible for its success?

Cong. Celler, Chairman of the House Judiciary Committee, and floor manager of the Civil Rights Act, replied (*Id.*):

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out.

Cong. Williams' amendment was defeated by a voice vote.[11] The Senate accepted § 703(e) as written by the House. The Clark-Case materials which explain the views of the Act's sponsors state (1964 Leg. Hist. at 3013-3014):

> Question. Section 704 describes the employment practices which are made unlawful by this bill. Subsection (e) of that section provides certain exceptions—namely: "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to

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[11] See also the statement of Rep. Corman, in another context, that permitting black employers to hire black salesmen because their customers are black would require permitting white employers to hire only whites in the same circumstances—perpetuating the very attitudes the bill was designed to erase, 110 Cong. Rec. at 2559; see also *id.* at 2563 (Rep. Roosevelt).

> the normal operation of that particular business or enterprise''. . . . But what of other reasonable occupational qualifications? The Harlem Globe Trotters may well wish to preserve their racial identity. A movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible. . . .
>
> Answer. Although there is no exemption in title VII for occupations in which race might be deemed a bona fide job qualition, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro—but such a person might actually be a non-Negro. Therefore, the act would not limit the director's freedom of choice. With regard to the Harlem Globe Trotters, it is probably true that they have less than 25 employees—and so they would not be covered by the act in any case. . . .

It would appear that in 1964 the sponsors of Title VII rejected the proposal that employers be permitted to make race-based employment decisions where those decisions would be ''reasonably necessary to the normal operation'' of their businesses. Of course, the argument that public employers should be allowed to take race into account when necessary to meet compelling public interests is, from a legislative viewpoint, a far stronger one. But so far as we have ascertained the only accommodation Congress appears to have made in 1972 to the special needs of public employers is the exclusion of certain categories of employees from coverage under the Act, see § 701(f), an exclusion that does not embrace the employees involved in this case. Our search of the legislative materials uncovered nothing indicating that Congress intended to provide an operational needs defense for public employers' race-based decisions beyond that provided by § 701(f). It may be, therefore, that the petitioners' Title VII claim, were it properly before

this Court (see point I-C, *supra*), would pretermit the other race discrimination issues in this case.[12]

III.

If the "operational needs" of the California Department of Corrections serve to validate the program here at issue under Title VII, then the Court must face a Constitutional issue different in nature from any it has faced before. The so-called "affirmative action" cases this Court has previously measured against the Constitution all involved programs or plans which in one way or another were meant to end the racial divisions that exist in our society. See *United Jewish Organizations* v. *Carey, supra,* (use of racial criteria in establishing voting districts to enhance opportunity for the election of minority representatives); *University of California Regeants* v. *Bakke, supra,* (use of racial quota in admissions to medical school to overcome disadvantages resulting from societal discrimination and to secure a racially diverse student body);[13] *Fullilove* v. *Klutznick, supra,*

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[12] Conceivably, a Constitutional question might arise were Title VII to prevent a State from carrying out its essential functions. See *National League of Cities* v. *Usery,* 426 U.S. 833; but see *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 453, n. 9.

[13] Mr. Justice Powell, writing separately, discussed an additional purpose of the quota program in *Bakke*. The purpose of "improving the delivery of health care services to communities underserved" (438 U.S. at 310). Justice Powell stated (*ibid.*):

> It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.

Subsequently, in *Fullilove, supra,* Justice Powell, in a concurring opinion, referred to that discussion in *Bakke* in the following passage (48 LW at 4995):

(use of minority set-aside to overcome "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities," 48 LW 4987). As indicated by the diversity of views in the various opinions in these cases, the Constitutional issues raised by even such programs and plans are fraught with difficulty and complication.

The "operational needs" justification offered in this case is not premised upon a design to redress racial division. Rather, it is built upon the reality that a significant degree of racial polarization remains in our society; it would accommodate that reality in the service of legitimate state interests having nothing to do with race; and, in so doing, it would accept, and to a degree perpetuate, the existence of such polarization.

Therein lies the dilemma that this rationale presents—a dilemma which, we submit, is particularly difficult to resolve. On the one hand, it cannot be denied that there are instances where the present state of racial division in this country poses a significant obstacle to the achievement of important governmental objectives. The most striking example is perhaps the achievement of effective law enforcement in certain racially-tense communities. One court that has confronted this problem put the argument for a racially-based hiring program this way:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public

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Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a non-racial means should be available to further the legitimate governmental purpose. See *Bakke*, 438 U.S., at 310-311.

> respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the district court misconstrued this justification for affirmative action, and that the justification offered by defendents is a substantial one. [*Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 696 (6th Cir.) (petition for certiorari pending].

On the other hand, to accept that the racially-based "perceptions" of one group or another may dictate public policy is in part to validate those perceptions. The use of racial stereotypes as a premise for governmental action perpetuates those stereotypes and puts further off the day when racial polarization is not a pervasive factor in our society.

It is important to recognize in this connection that the "operational needs" justification, based as it is on "public perceptions," is not self-limited, as are the other "affirmative action" rationales this Court has reviewed, to situations where an advantage accrues only to some disadvantaged minority. To the contrary, pandering to the racial stereotypes of a majority constituency could as well, in many instances, significantly further an important governmental objective. The argument made in the *Detroit Police Officers'* case could as easily be made in many white communities to justify the preferential hiring of white police officers.

It is important too to recognize that the "operational needs" justification has potential application to virtually every facet of governmental activity. The effectiveness of teachers, social workers, psychologists, doctors, supervisors, bureaucrats, prosecutors, judges, and other governmental occupations may, in certain circumstances, depend

upon the racial perceptions of the person or group being served.

The logical reduction of the rationale is to divide government along racial lines, black public servants serving predominantly black communities, and whites serving whites. We do not suggest that such an extreme would result if this Court were to accept the "operational needs" rationale presented in this case as a compelling state interest for Fourteenth Amendment purposes. We do suggest that inherent in any such decision would be an acceptance, and a perpetuation, of some degree of racial polarization. Resolution of this Constitutional question requires some trade-off between the ability of governmental entities to meet today's exigencies and the opportunity for a future society free of racial polarization.

These are not reasons for refusing to decide the important questions petitioners press on the Court. The more basic the Constitutional issue to the development of this society the more certain it is that the Court must confront it. But they are the most compelling possible justifications for assuring that the case is properly here, that it presents those questions in a form that frames the relevant considerations in bold relief, and that the statutory avenues for resolution of the issues have been exhausted. None of those conditions is satisfied in this instance. The writ of *certiorari* should therefore be dismissed.

CONCLUSION

For the above stated reasons, the writ of *certiorari* should be dismissed.

Respectfully submitted,

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No. 79-1213

In the Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL is vitally interested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the ADL has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g., Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *De Funis* v. *Odegaard,* 416 U.S. 312 (1974); *Regents* v. *Bakke,* 438 U.S. 265 (1978); *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979); and *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (1980).

The ADL deplores the continued existence in this country of discrimination based upon race, religion and perceived national or ethnic origins. Not until discrimi-

nation is eliminated will the United States be a nation where all citizens in fact enjoy equal opportunities, as they should. Improperly drawn "affirmative action" plans, however, such as the plan here at issue, which are based upon the assignment of specific employment positions according to governmentally designated racial, ethnic and surname classifications, do not promote equal opportunity; rather, they foster arbitrary, divisive and discriminatory action by state government. Such a plan cannot be squared with the Constitution.

Just as ADL has in the past opposed discrimination based on race, religion or ethnic origin, so too is ADL opposed to any scheme of governmental preferences or benefits based upon the race, religious beliefs or ethnic origin of individuals. Such a scheme violates the most fundamental concept of equal protection by imposing a regime whereby the government prefers members of certain designated racial or ethnic groups over other citizens, even where the beneficiaries of the preference have not themselves been discriminated against. Such a scheme cannot pass the constitutional test of equal protection, the decisions of this Court in *Weber* and *Fullilove* notwithstanding. ADL respectfully submits that the racial discrimination permitted in these cases is not a blank check for government to sponsor racial preferences in all circumstances and that this case clearly is beyond the line of preferences previously permitted by the Court.

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

STATEMENT OF THE CASE

In 1974 the California Department of Corrections (hereinafter "Department") adopted an Affirmative Action Plan (hereinafter "AAP"), a principal objective of which

is "increasing the number of 'minority' employees to a level equalling at least 70% of any 'minority' in the inmate population of the Department (i.e., State prisoners)." *Minnick* v. *California Department of Corrections,* 95 Cal. App. 3d 506, 514, 157 Cal. Rptr. 260, 264 (1979).*

The AAP requires increases in the employment of the following minorities by various segments of the Department: "Black," "Asian," "Spanish surname," "Native American," and "other extraction." The AAP set a goal of "36% minorities employed" by July, 1979, *Minnick, supra,* 157 Cal. Rptr. at 264;** the AAP itself, however, contains no expiration date, Exhibit R. The AAP is to be applied in all areas involving the promotion, transfer, training and work assignments of the Department's personnel. *Minnick, supra,* 157 Cal. Rptr. at 264.

The AAP's purpose is to serve "inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." *Id.* at 264. The Department believed "that race . . . may be one pertinent factor, among others, affecting the ability of an individual to communicate with and relate to members of a par-

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* This brief does not address any questions raised by the AAP's other principal objective, increasing the number of female employees in the Department to a percentage equivalent to that in California's labor force.

** By contrast, the "special admissions" program to the medical school at the University of California at Davis was 16% of the entering class, *Regents* v. *Bakke,* 438 U.S. 265, 275 (1978); the federal public works set-aside for Minority Business Enterprises was 10%, *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979, 4980 (1980).

ticular race. . . ." Respondents' Brief in Opposition to Writ of Certiorari, p.13.*

When the preferences of the AAP were applied, a person's status as a "minority" was considered at least a "plus" factor in the decision to promote or transfer an employee. This "plus" was sometimes decisive in the promotion or transfer of a less qualified candidate from an officially preferred minority group over a more qualified candidate from a group which the Department did not choose to recognize as one which should be favored in its AAP. It is not clear how widely the preferential policies of the AAP were pursued within each unit of the Department. *Minnick, supra,* 157 Cal. Rptr. at 264.

During the administration of the AAP, vacancies in certain positions were sometimes left open, and promotions or transfers to them were sometimes delayed, until qualified employees from preferred groups could be found to fill them. Some of these positions were labelled as "only" for members of designated preferred groups. *Id.* For example, positions were advertised as "Corr[ectional] Sergeant-Minority," Exhibit 11, and "Correctional Lt.-Minority," Exhibit 13.

Even when positions were not reserved by title to members of certain groups, the Department's officials expressed an intention to fill positions with members of

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* For example, defendants' expert witness, Dr. David Lopez-Lee, testified "that the odds are better than chance that a black person will relate better to a black person than he will to a white person and vice versa." RT 853. Dr. Lee, however, also noted that "It's not to say that you'll not have black persons that relate better to whites and vice versa," RT 853, and he admitted "that people can relate to one another . . . based on . . . a whole host of variables, only one of which is race," RT 856.

(Citations to the record herein are to the Reporter's Transcript ("RT"), the Clerk's Transcript ("CT") and to particular exhibits.)

preferred groups. RT 39; RT 55-56. These officials told employees that, because of their race, they need not apply for certain positions. RT 69-70, 150-51.

There is no procedure to resolve disputes about the classification of particular persons. The Department has no scientific or other objective basis by which to classify employees and inmates into the categories for granting preferences under the AAP. *Id.* at 226, n.5. See also RT 700 (fourth-generation Mexican named "Cohen" would not qualify for any preference). No scientific means can apply the categories of the AAP to individuals.

Wayne Minnick and Henry J. Darden, who are both White, are correctional officers employed by the Department. They are also members of the California Correctional Officers Association (hereinafter "CCOA"), a recognized bargaining agent of correctional officers and other employees of the Department. Minnick applied for a position as a Correctional Program Supervisor II in May, 1975. He did not receive the promotion. He filed a grievance to which the Department responded in part:

> "We are required to implement the Departmental Affirmative Action program at all levels. We are attempting at this time to fill the CPS positions with a qualified minority or female."

RT 39.

Similarly, Darden applied for a position as a Program Supervisor III in February, 1975, and did not receive the promotion. He filed a grievance to which the Department responded in part:

> "We have not committed our CPS III position to anyone; however, we are actively canvassing to try to fill this position on a staff development basis with a minority staff member of CC I or P.A. I level. We have no CPS III minority staff at this facility and it

> is our intention to fill this position with a minority member. . . ."

RT 55.

Minnick and Darden filed grievances with the State Personnel Board without success. Later at trial, it was determined that neither Minnick nor Darden had been eligible for promotion under civil service rules which applied apart from the AAP. *Id.* at 264.

CCOA bases its standing to bring this action on the following allegation:

> "Plaintiff CCOA is damaged by the employment practices described herein in that it actively seeks, on behalf of its members and all correctional officers employed by the STATE OF CALIFORNIA, to have each person judged on the basis of his or her abilities, and not on the basis of race, color, national origin, or sex. The sort of employment practices engaged in, on information and belief, by defendants in fact divide one correctional officer from another, and do in fact, on information and belief, increase racism and sexism in our society. As an organization actively opposed to racism and sexism, and working actively to increase the unity of all correctional officers, plaintiff CCOA has no plain, speedy or adequate remedy at law to rectify the unlawful employment practices described herein other than by the relief prayed for in this Complaint."

First Amended Complaint, p.11. CCOA has offered no evidence that it suffered any financial or other concrete injury as a result of the AAP.

The trial court denied plaintiffs' motion for certification as a class action because Minnick and Darden had not shown that they had been denied promotion because of allegedly discriminatory personnel practices. The court, however, accepted a stipulation that plaintiffs had

standing to obtain relief apart from money damages. *Id.* at 265.

In response to an interrogatory, the Department denied that it had "willfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities . . . on the basis of a person's race, color, creed, sex or national origin." *Id.* The trial court denied respondents' motion for an order augmenting the record to include evidence to show that the AAP had been designed in part to rectify past practices which had operated to discriminate on racial and other grounds. *Id.** As the record stands there is no evidence of past discriminatory practices by the Department. The court instead looked to such interests as promoting safety in prisons and minimizing racial tensions as the purported justification for the AAP. *Id.* at 266 n.5. It declared that the AAP violated, *inter alia,* the Fourteenth Amendment to the United States Constitution. *Id.*

The court of appeal affirmed the trial court's denial of the motion to augment the record to include evidence of past discrimination, characterizing the motion as an "afterthought." *Id.* at 272. It reversed the trial court's order granting declaratory and injunctive relief, holding that the AAP did not provide for "functional quotas" which would violate the Equal Protection Clause or the California Constitution. *Id.* at 269-70.

The petition for writ of certiorari was granted by this Court on July 2, 1980. 48 U.S.L.W. at 3855.

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* The Department's proffered evidence of past discrimination relied primarily on "institutional" or "societal" racism. *E.g.,* Exhibit Q, p.4:

> Over the years the Department has actively practiced racism—often times without realizing it, and in about the same degree as racism exists in society.

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal, which upholds employment preferences based upon racial and surname criteria, violates the fundamental principle of our democracy that all persons are entitled to equal protection of the law. The purported purpose of the Affirmative Action Plan ("AAP") is to increase the efficiency of prison management by lessening racial tensions; the AAP is not designed to eradicate the present effects of part discrimination. A classification based upon such a purpose is inherently suspect and calls for the most exacting judicial examination.

The AAP is not based upon the action of any legislative body, let alone the United States Congress. This plan is not entitled to the deference which this Court accorded the public works set-aside for minority businesses in *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (1980).

The objectives of the AAP are not compelling. Never has this Court approved a racial preference which is designed to help make government more efficient. The assumption that racial preferences can ever lessen racial tensions is wrong, and, in any event, this Court has never shirked from its duty to enforce the Equal Protection Clause for fear of provoking racial hostilities. This Court's decisions in *Regents* v. *Bakke,* 438 U.S. 265 (1978), *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) and *Fullilove, supra,* which gave limited approval to racial preferences, do not authorize the discriminatory policies of the AAP.

The AAP also fails strict scrutiny because it is not precisely tailored to serve its objectives. Its assumption that persons of certain groups communicate and "relate" best with their own kind, (which some of Respondents'

own evidence tends to disprove) is an irrebutable employment policy which overlooks the talents and abilities of particular individuals. Far from lessening racial tension, the AAP widens the divisions between groups.

The AAP, unlike the provision approved in *Fullilove,* has no procedure for resolving disputes about its application to individuals and no provision for exemption in particular cases. It bears the burden of any plan which categorizes persons according to racial categories: government becomes involved in the dirty business of subjecting the racial identity of individuals to scrutiny, and the results are likely to be arbitrary and inconsistent.

Although we believe this Court should address the merits, we also feel obliged to note the jurisdictional problems posed by the lack of standing on the part of plaintiffs to present this case. The individual plaintiffs lack standing because civil service rules, which they have not challenged, rendered them ineligible for promotion apart from the operation of the AAP. Any possible future injury to them is merely speculative. The organizational plaintiff has not alleged an injury to itself, but only to its objectives. It cannot base standing upon any injury to its members because no such injury has been shown and the degree of possible injury—or benefit—to members would require individualized proof. Accordingly, in the alternative, we ask that this Court dismiss the writ of certiorari as improvidently granted.

ARGUMENT

I. The Purported Administrative Goal Of Promoting Safety And Efficiency In A Prison System Is Not A Compelling State Interest Which Justifies The Promotion Of Correctional Officers According To Their Race And Surnames.

The AAP is a racial preference in employment by the state. Its purported purpose is to increase the efficiency of prison management by lessening racial tensions; it is not a remedy for past racial discrimination. Surely the AAP creates an "inherently suspect" classification which "call[s] for the most exacting judicial examination," *Bakke, supra,* 438 U.S. at 291 (opinion of Powell, J.). Such a racial classification is constitutionally prohibited unless it is a necessary means of advancing a "compelling governmental interest." See *In re Griffiths,* 413 U.S. 717, 721-22 (1973); *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964).

The question before this Court is whether assertions of efficiency and the purported lessening of racial tension will be added to the short list of governmental objectives which have been held to justify the treatment of Americans according to their race. This case, even more than *Bakke, Weber* or *Fullilove,* represents a threat to principles of racial equality because the interests asserted here have consistently been rejected by this Court as a justification for discrimination.

Neither court below found or relied upon the present effects of past discrimination to support the AAP in any way. See p.6 *supra.* Instead, the rationale for this race-conscious AAP is as follows:

> The AAP indicated, and there was evidence, that the desired "minority" level would serve inmate-related objectives of the Department by improving rela-

> tionships with prisoners and reducing severe racial conflict and violence within the State prison system.

Minnick, supra, 157 Cal. Rptr. at 264. See also *id.* at 268:

> the trial court effectively determined that the practices apply to prison-related realities of race . . . to the point of promoting a "compelling state interest" in a safe and efficient correctional system.

Such considerations of prison management do not justify an exception to constitutional principles of racial equality. For example, in *Lee* v. *Washington,* 390 U.S. 333 (1968) (*per curiam*), *aff'g* 263 F. Supp. 327 (M.D. Ala. 1966) (per Johnson, J.), Alabama's argument that "routine prison security and discipline" required segregation of prisoners by race failed, because *Brown* v. *Board of Education,* 347 U.S. 483 (1954), foreclosed the segregation of any state facilities. Judge Johnson held, in an opinion which the Supreme Court described as "unexceptionable," 390 U.S. at 334:

> this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities.

263 F. Supp. at 331. Three members of this Court noted:

> prison authorities have the right, acting in good faith and *in particularized circumstances,* to take into account racial tensions in maintaining security discipline and good order in prisons and jails.

Id. at 334 (concurring opinion of Black, Harlan and Stewart, JJ.) (emphasis added).* The lower courts quite prop-

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* Judge Johnson's sole example of an "isolated instance" which could require segregation for "a limited period" was the "tank" used in large cities, where intoxicated persons are kept until they become sober. 263 F. Supp. at 331 n.6.

erly have interpreted this statement narrowly to mean only that "there may arise unusual circumstances in which security and discipline demand segregation for limited periods," but not systematically, *United States* v. *Wyandotte County, Kansas,* 480 F.2d 969, 971 (10th Cir. 1973), *cert. denied,* 414 U.S. 1068 (1973) ("We cannot construe this caveat as authorizing the consistent and settled practice of 'Negroes to the East tank, whites to the West tank,' we have before us.")

No emergency justifies the racial preferences in the case at bar but rather a desire to lessen racial tension generally. Respondents cite no particularized circumstances to explain their plan, only the generalized rise of racial tensions in the 1960's and 70's and the supposed inability of persons to communicate and "relate" with persons from other groups. The AAP does not assign a Black guard to a particular cell block for a day or two during an emergency; it prefers a Black guard to his White colleagues in perpetuity in all areas of employment, including promotions, transfers, training and work assignments. This systematic attempt to combat problems by using a racial solution is the kind of unparticularized plan which three members of this Court expressly sought to prevent by warning that, in the context of prisons, the Court would countenance no "dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination," *Lee, supra,* 390 U.S. at 334.*

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* The degree to which this plan prefers members of certain groups is disputed, but whether the AAP operates as a strict quota or as a deciding "plus" with respect to certain individuals, it cannot pass constitutional muster because it does not serve compelling state interests. In any event, it is important to note that the plan would promote members from preferred groups until they equal fully 70% of the population of such groups among the inmates.

If the needs of prison security and discipline cannot justify violating the rights of the prisoners to desegregated facilities, then *a fortiori* they may not be allowed to violate the rights of the prison guards to equal employment opportunities. Prisoners do not lose all their constitutional rights when they enter prison; certainly the guards should not lose *any* rights.

Moreover, lessening racial tension or increasing governmental efficiency cannot be deemed to be the type of state interest which justifies racial discrimination; otherwise, there would have been no basis for desegregating prisons in the South or for integrating neighborhood schools in the North. Antimiscegenation statutes might still survive, because they were supported by the idea that racial discrimination diminishes the contacts and therefore the tensions between races, *e.g., Perez* v. *Lippold,* 32 Cal. 2d 711, 198 P.2d 17, 26 (1948). This Court has never allowed such asserted interests to overcome the Constitution's clear commands:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.

Buchanan v. *Warley,* 245 U S. 60, 81 (1917) (striking down ordinance making it unlawful for colored person to occupy a house on a block where a majority of residents were Whites). See also *Watson* v. *Memphis,* 373 U.S. 526, 536 (1963) (fears by public officials of violence and inability to preserve peace not allowed to delay desegregation of schools).

Presumably, White prison guards are among the intended beneficiaries of the plan to lessen racial tensions in

prison. But Wayne Minnick and Henry J. Darden are willing to take their chances with the racial tensions of a prison system without the AAP in effect and to serve in a prison where persons of their own race are outnumbered. Their willingness to work in a difficult job is more in harmony with the principles underlying the Court's landmark racial equality decisions than is the California Department of Correction's imposition of racial preferences in employment as a supposed solution to racial tensions.

The goals of the AAP before the Court stand in contrast to those approved in *Fullilove* v. *Klutznick,* 48 U.S. L.W. 4979 (1980), *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979), and *Regents* v. *Bakke,* 438 U.S. 265 (1978).* In *Fullilove,* an essential feature of the minority set-aside was that it was a "remedial" plan, designed to prevent "procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination. . . ." 48 U.S.L.W. at 4986 (opinion of Burger, C.J.). See also *id.* at 4995 ("[e]nactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination") (opinion of Powell, J.); and *id.* at 4998 ("principles outlawing the irrelevant or pernicious use of race were inapposite to racial classification that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination.") (opinion of Marshall, J.). No remedial goal supports the plan in *Minnick,* nor is the plan based on any statutory authorization with accompanying findings of previous discrimination.

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* The citation of these three decisions does not imply that the Anti-Defamation League of B'nai B'rith believes that they were correctly decided. The principles which those cases recognized, however, do not support the decision below.

In *Weber,* although there was no state action, the Court carefully noted that the affirmative action plan was "a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance," 443 U.S. at 208. The goal of the plan was "to break down old patterns of racial segregation and hierarchy." *Id.* The AAP in *Minnick* turns *Weber's* plan on its head. It is not designed to eliminate a manifest racial imbalance between the work force and the general population, because there is none on this record. Its purpose is to achieve and maintain a racial balance between correctional officers and the inmate population. It does not break down old patterns of racism, but yields to racism by creating a new racial hierarchy.

The management of a prison system lacks the favored constitutional status of "the attainment of a diverse student body," the goal which Mr. Justice Powell regarded as "compelling" in *Bakke.* His opinion describes the way that "[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment," 438 U.S. at 311-12. There are no similar considerations involved in the management of prisons.

Moreover, the justification invoked by respondents here will be difficult to cabin. Affirmance would allow prisons and jails all over the country where racial tensions exist to discriminate against some of their correctional officers. Public schools, which also experience violence and problems of communication, could choose to promote teachers from favored racial groups instead of their better qualified colleagues.

Furthermore, if the facts were reversed and there were more Whites among prisoners than there were among the guards, an identical rationalization would be available for favoring White correctional officers at the expense of

Blacks. Indeed, if racial tensions existed in any governmental setting in which Whites predominated, officials could set a goal for preferring Whites in a supposed effort to combat problems of communication between groups. Thus, racial preferences such as the AAP can be turned against the groups in our society who have suffered from racial discrimination in the past.

We all recognize that prison management is difficult, that racial tensions exist, and that violence erupts. But the Constitution will not permit such problems to be the basis for depriving innocent persons of their right to racial equality. Affirmance of the appellate court's decision would signal a retreat from threats of racial violence and be a victory for bigotry.

II. The AAP Does Not Pass The Scrutiny Required By Equal Protection Because There Are Less Drastic Means To Manage Prisons Efficiently Than By Depriving Correctional Officers Of Their Employment Rights.

The AAP places the burden of racial hostilities in prisons entirely upon correctional officers from disfavored racial groups. No scientific or objective basis exists by which to classify people into one category or another. There is no procedure for resolving disputes about categorizing individuals.

In this case, strict scrutiny is the proper standard of review. Classifications which deny a benefit to any individual because of race or ethnic background "are inherently suspect and thus call for the most exacting judicial examination." *Bakke, supra,* 438 U.S. at 291 (opinion of Powell, J.). Even when strict judicial scrutiny is not required, under *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 17 (1973), a provision "must still be examined

to determine whether it rationally furthers some legitimate, articulated state purpose and . . . does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.'"*

The AAP cannot satisfy the command of the Equal Protection Clause that all provisions "affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives," *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). It imposes disabilities upon the members of disfavored racial groups indefinitely.**

The plan rests upon broad and unwarranted assumptions about the ability of people from different groups to communicate with each other. See p.3 *supra*. It does not take into account the fact, which plaintiffs' expert witness

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* Four members of this Court have applied a less strict test for scrutinizing racial classifications in which the majority racial group disadvantages itself so as to benefit a "discrete and insular minority" which lacks political power. *Bakke, supra*, 438 U.S. at 362 (opinion of Brennan, J.). This test is grounded on the need to bring historically disadvantaged racial groups into the mainstream of society. See *id.* at 396 (opinion of Marshall, J.) ("bringing the Negro into the mainstream of American life should be a State interest of the highest order"). The rationale for this test does not apply where, as here, the benefit for the racial minority has nothing to do with the eradication of the present effects of past discrimination. The AAP's assumption is that people from *all* groups communicate better with their own kind. This assumption would justify favored treatment for White correctional officers if the facts were reversed. This classification, therefore, does not merit the looser scrutiny which the test articulated by Mr. Justice Brennan applies.

** The relatively short duration of the minority set-aside in *Fullilove* was referred to by two opinions upholding the provision, 48 U.S.L.W. at 4990-91 (Burger, C.J.), and *id.* at 4997 (Powell, J.)

admitted, that there are "black persons that relate better to blacks and vice versa." *Id.*

Less drastic plans to achieve the goals of the AAP would give due deference to the varied gifts of individuals without discriminating; for example, by promoting correctional officers who demonstrate an ability to communicate with persons outside of their own racial groups, training correctional officers in communications, deploying guards with the best ability to communicate during emergencies, or even increasing the mobility and visibility of guards who are members of minority groups.

There are no congressional findings of past discrimination to support the AAP as there had been in *Fullilove, supra.* There are no findings even by the California legislature. But the AAP would not survive equal protection analysis even if it had been adopted by Congress itself because its administration offers no safeguards to assure that it is narrowly tailored to the achievement of its goal, *Fullilove, supra,* 48 U.S.L.W. at 4988 (plurality opinion, per Burger, C.J.). Among the safeguards which the Court deemed significant in *Fullilove* was an administrative mechanism, including a complaint procedure, to ensure that only bona fide Minority Business Enterprises are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination. 48 U.S.L.W. at 4990. By contrast, the assumptions underlying the AAP may not be rebutted in the administrative process as they were in *Fullilove.* Nor are there procedures for waiver and exemption.

Moreover, the record in this case is devoid of any procedure, administrative or otherwise, for applying fairly

the AAP's undefined criteria to individuals. In *Fullilove,* at least, the plurality noted that "[a]dministrative definition has tightened some less definite aspects of the statutory identification of the minority groups. . . ." 48 U.S. L.W. at 4990. But the trial court in *Minnick* found that:

> Defendants have no scientific or objective basis whatsoever by which they classify people into one racial category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants. Defendants have no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another, can complain, or by which a person complaining of the categorization of another person may complain.

157 Cal. Rep. at 266 n.5. The indication that the plan merely represents an "'optimum' quota", which for unexplained reasons has not yet been attained, *id.* at 268, certainly offers no assurance that the AAP can ever be applied fairly to individuals.*

The appellate court understated the problem of administration when it observed, "the identification of race by surname is somewhat casual and very possibly inaccurate, (e.g., in identifying the race of a woman married to a husband with an Asian surname)." *Id.* at 271. Presumably, a person of Spanish extraction whose parents were born in the United States would qualify for the prefer-

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* *Fullilove* requires that, even in a facial challenge, a racial classification "cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that it will be limited to accomplishing [its] objectives and that misapplications of the program will be promptly and that misapplications of the program will be adequately remedied administratively." 48 U.S.L.W. at 4989-90 (opinion of Burger, C.J.). There is no such assurance here.

ence, while a child born to a Mexican mother and a father without a Spanish surname would not. The term "Asian" may broadly refer to anyone originating in the world's largest continent, or it may denote a smaller number of particular groups; *e.g.*, those originating in Southeast Asia or China or Japan. In addition to such anomalies, there are the perplexities inherent in any attempt to define the race of an individual. Science has not evolved a precise definition of race or ethnicity, much less precise definitions, which can classify individuals. See Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations,* 71 Yale L.J. 1387, 1421 (1962) (collecting citations).

The ugly task of racial categorization is complicated by the need to synchronize the racial composition of two groups, inmates and correctional officers. Unlike the minority set-aside at issue in *Fullilove,* this means that persons are entitled to a governmental benefit not only by claiming it themselves as a member of a favored group but by subjecting the racial identity of the inmate population to scrutiny. The employment rights of correctional officers could hinge on periodic counts of the racial identities and surnames of those newly incarcerated in and newly discharged from the prison, yet the AAP has no objective basis for classifying individuals and no procedure for resolving disputes about particular classifications.

The courts in California will not supply the precision in applying these racial preferences that the Equal Protection Clause requires. The Supreme Court of California has held that racial terms such as those used in the AAP are invalid because they are too vague and uncertain. In *Perez* v. *Lippold,* 32 Cal. 2d 711, 198 P.2d 17, 27-29 (1946) (en banc) (per Traynor, J.) the court held that an anti-miscegenation statute was void on its face because, *inter*

alia, the terms "white persons", "Negroes, Mongolians, members of the Malay race or Mulattoes" could not reasonably be applied:

> "If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one."

198 P.2d at 29. With no basis for applying the AAP fairly to individuals, the AAP is inherently arbitrary.

Allowing a state agency to classify individuals according to race is particularly dangerous. See *Regents* v. *Bakke,* 438 U.S. 265, 309 (1978) (opinion of Powell, J.) ("isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria."). This plan harks back to a time when segments of state governments made distinctions based upon race which not only were arbitrary,* but also conflicted.**

The AAP offers a blunt instrument when the Constitution requires precision. While purporting to alleviate racial tension, it visits the consequences of racial prejudice on innocent groups. It irrationally varies the employment rights of prison staff according to the racial

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* See, *e.g.,* Mangum, The Legal Status of the Negro 1-17 (1940); Murray, States' Laws on Race and Color (1950 and 1955 supp.) (see "Negro, definition of" under state name in index).

** Compare Ala. Code tit. 1, § 2 (1940) ("Negro" includes a person of mixed blood descended on the part of the father or mother from Negro ancestors, without reference to or limit of time or number of generations), with Tex. Penal Code Art. 493 (1947) ("Negro" includes a person of mixed blood descended from Negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a White person).

composition of prisoners. No legislative action, no findings of fact justify the plan. There are no safeguards of enforcement and no expiration date. Moreover, the AAP involves a segment of state government in the business of classifying individuals into arbitrary categories. This provision was not drawn with precision or tailored to serve legitimate objectives.

The judgment below should be reversed because it condones the use of a patently unconstitutional means to an invalid end. The AAP creates a preferred employment status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color or parental origin. The AAP is a divider of society in a nation striving for an equality that will make race irrelevant, politically, economically, and socially.

III. None Of The Petitioners Has Standing To Challenge The Constitutionality Of The Affirmative Action Plan Of The California Department of Corrections.

Although we contend that, if this Court reaches the merits, the judgment of the court of appeal should be reversed, we are bound to note that the pleadings and record in this case reveal that none of the petitioners has standing to challenge the constitutionality of the AAP. None has been injured: Minnick and Darden were not eligible for positions they sought, wholly apart from the AAP. CCOA has shown no injury other than that allegedly suffered by Minnick and Darden. Thus, the petitioners have not alleged or shown "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," *Baker* v. *Carr,* 369 U.S. 186, 204 (1961). In the absence of this concrete adverseness, this

Court should dismiss the petition for certiorari as improvidently granted.

This Court is not bound by the California courts' implicit determination that this case is within the jurisdiction of the courts. To the contrary, as Justice Frankfurter wrote,

> To whom and for what causes the courts of [a state] are open are matters for [that state] to determine. But [that state] cannot define the contours of the authority of the federal courts, and more particularly of this Court. It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances.

Coleman v. *Miller,* 307 U.S. 433, 462 (1939) (concurring opinion). See also *Doremus* v. *Board of Education,* 342 U.S. 429, 434 (1952) (Supreme Court not bound by state court's acceptance of jurisdiction, concluding that the record did not establish plaintiffs' standing).

The review required by Article III of the Constitution reveals that there is no basis for standing here. The trial court's acceptance of a stipulation by the parties is not a ground for standing. See, *e.g., Bartemeyer* v. *Iowa,* 85 U.S. (18 Wall.) 129, 135 (1873) (failure to deny jurisdictional allegation did not confer jurisdiction); *California* v. *La Rue,* 409 U.S. 109, 113 n.3 (1972) ("parties may not confer jurisdiction . . . upon this Court . . . by stipulation").

If a party is to satisfy minimum standing requirements, he must allege that he has suffered or will suffer some concrete "injury in fact," *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 218 (1974) (no standing as citizens or taxpayers to challenge membership of congressmen in armed forces reserves), or that he " 'is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct,"

O'Shea v. *Littleton,* 414 U.S. 488, 494 (1974) (no standing to challenge allegedly discriminatory judicial practices by those not injured).

Plaintiffs Minnick and Darden cannot satisfy these tests for "injury in fact," because the evidence established that neither plaintiff "had been eligible for promotion under conventional civil service rules which applied irrespective of the AAP or its implementation." *Minnick, supra,* 157 Cal. Rptr. at 264. Therefore, this Court cannot find, as it must under Article III, that "plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision," *Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 38 (1976).

Petitioners' assertions of injury in the future from the implementation of the AAP also fail to meet the minimum standing requirements of Article III. The threatened injury is "conjectural" or "hypothetical" rather than "real" and "immediate," *O'Shea* v. *Littleton, supra,* 414 U.S. at 494. Minnick and Darden's allegations of future injury follow a wholly speculative chain of reasoning: *If* the individuals continue their employment with the Department of Corrections and *if* they ever become qualified for promotion under unchallenged civil service rules and *if* they seek promotion and *if* the AAP remains in force and *if* they are denied promotion on the basis of race as a result of the AAP, they will suffer injury in fact. Certainly, to accept this line of reasoning would require the Court to engage in speculation that is insufficient to establish standing.

CCOA, the organizational plaintiff, also fails the test of "injury in fact." At trial below, CCOA alleged that it had been " 'damaged' by the described employment practices because they frustrated its objectives as 'an organization actively opposed to racism and sexism, and working actively to increase the unity of all correc-

tional officers . . . .' " *Minnick, supra,* 157 Cal. Rptr. at 263. This allegation, and the evidence adduced, are insufficient to confer standing, because there is no injury to the organization itself, merely to a generalized concern. In *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), an environmental group, which had a long-standing interest in conservation, sought to challenge actions by the Department of the Interior that would have transformed a "quasi-wilderness" area into a ski resort. The Sierra Club, in a manner similar to the CCOA here, alleged standing on the ground that it possessed " 'a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,' " 405 U.S. at 730. In holding that the plaintiff lacked standing, the Court stated:

> [T]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

Id. at 734-35. Neither a protected activity nor the livelihood of CCOA is threatened by the AAP.*

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* Compare the injury alleged here (frustration of objectives) with those deemed sufficient in *NAACP* v. *Button,* 371 U.S. 415, 428 (1963) (NAACP had standing to challenge a statute that "infringes the rights of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their . . . rights."), and *Data Processing Service* v. *Camp,* 397 U.S. 150, 152 (1970) ("competition by national banks in the business of providing data services might entail some future loss of profits").

The other injuries which CCOA complains of—payment of expenses to guarantee the constitutional rights of correctional officers, Amended Complaint, pp. 13, 14—cannot confer standing because *any* association which takes an active interest in any cause would incur similar expenses.

Moreover, CCOA's allegations are insufficient to establish representational standing based upon injury to its members. An organization "can have standing as the representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit." *Warth* v. *Selden,* 422 U.S. 490, 516 (1975). Compare *Sierra Club* v. *Morton, supra,* 405 U.S. at 735 (no allegation of use of future resort area by members) with *United States* v. *SCRAP,* 412 U.S. 669, 687 (1973) ("action of [ICC] would directly harm [members] in their use of . . . natural resources").

There is no indication on the record that any of the CCOA's members, including Minnick or Darden, will be adversely affected or aggrieved by the AAP. It is not an appropriate function of this Court to speculate as to whether the CCOA has other members who were injured as a result of the AAP. See *Sierra Club* v. *Morton, supra,* 405 U.S. at 735 n.8 (1972). In any event, CCOA also presumably has members who have benefited from the AAP, the members who fall within the preferred classifications. Where, as here, "the damages claims are not shared by all in equal degree . . . and both the fact and extent of the injury would require individualized proof," the organization has no standing based upon alleged injury to its members, *Warth* v. *Selden,* 422 U.S. 490, 515-16 (1975). Thus, the petition for certiorari should be dismissed as improvidently granted.

CONCLUSION

This Court should reverse the judgment of the court of appeal and direct that judgment be entered in favor of petitioners on the ground that the AAP violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, or alternatively, dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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No. 79-1213

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN,
CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents

On Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF AMICI CURIAE OF THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING AND CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION IN SUPPORT OF RESPONDENTS.

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No. 79-1213

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN,
CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

VS.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

On Writ of Certiorari to the California Court of Appeal, First Appellate District

---

BRIEF AMICI CURIAE OF THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING AND CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION IN SUPPORT OF RESPONDENTS.

INTEREST OF AMICI CURIAE

The Department of Fair Employment and Housing and the Fair Employment and Housing Commission of the State of California are the agencies responsible, respectively, for the enforcement and adjudication of claims arising under the California Fair Employment Practice Act, Cal.Lab. Code §§ 1410-1433 (West 1971 & Supp. 1980), and the Rumford Fair Housing Act, Cal. Health & Saf. Code §§ 35700-35745 (West 1971 & Supp. 1980.)[1] The Fair Employment Practice Act creates a statewide remedy for victims of discriminatory employment practices. Under the Act the Department and Commission are mandated to safeguard the civil right of all persons to obtain and hold employment without discrimination on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age. Cal.Lab. Code §§ 1411, 1412. (West Supp. 1980). Consequently, California is a deferral state under section 706 of Title VII of the Civil Rights Act of 1964.

The Department of Fair Employment and Housing investigates complaints of discrimination, conciliates meritorious complaints when possible and initiates adversary proceedings before the Commission in those cases where conciliation efforts prove futile. In addition to its adjudica-

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[1]Pursuant to the Governor's Reorganization Plan No. 1, effective January 20, 1980, the Division of Fair Employment Practices and the Fair Employment Practice Commission, within the Department of Industrial Relations, were abolished and replaced by the Department of Fair Employment and Housing and the Fair Employment and Housing Commission within the State and Consumer Services Agency, which entities succeeded to the functions of the former Division and Commission. To codify this reorganization, the California Legislature adopted Assembly Bill No. 3165 which was signed by the Governor on September 10, 1980. As a result, effective January 1, 1981 the Fair Employment Practice Act and the Rumford Fair Housing Act will be combined to form the California Fair Employment and Housing Act and will be codified in the California Government Code at sections 12900 through 12966.

tory functions, the Commission is authorized to promulgate regulations interpreting and implementing FEPA. Finally, both the Department and Commission are routinely called upon to furnish technical guidance to public and private employers who are desirous of implementing voluntary programs to eliminate discriminatory employment practices. See Cal.Lab. Code §§ 1418, 1419, 1419.7, 1421-1425.5, 1431-1432 (West 1971 & Supp. 1980).

Amici have a substantial interest in the question whether a governmental entity may voluntarily adopt a race and sex-conscious, affirmative action program of limited duration to alleviate an underrepresentation of minority and women employees. A decision by this Court finding such voluntary affirmative action by governmental entities violative of Title VII or the Equal Protection Clause of the Fourteenth Amendment would severely impede *amici's* efforts to carry out the California Legislature's mandate.

Nothing in the Fair Employment Practice Act evidences any intent on the part of the California Legislature to preclude employers—public or private—from voluntarily implementing affirmative action plans to overcome the continuing effects of past discrimination. *Price v. Civil Service Commission* 26 Cal.3d 257, 276 (1980), *appeal dismissed as moot,* ..... U.S..... (1980). To the contrary in recent years the Legislature has enacted a number of statutory provisions which demonstrate an explicit legislative determination that such voluntary affirmative action fully accords with the State's firm committment to the principle of nondiscrimination. *Id.,* at 270; see Cal.Gov't Code §§ 19702, 19790-19797; Cal. Lab. Code §§ 1431, 1432(e) (West Supp. 1980).

Moreover, whatever success *amici* have achieved in implementing the objectives of the Fair Employment Practice Act has been largely dependent upon voluntary action by employers taken well before *amici* are compelled to invest substantial enforcement resources. In the past, voluntary measures by employers have often eliminated the need for

formal involvement by *amici* and have contributed to a high conciliation rate in California. Given *amici's* limited resources and the relative enormity of their task, any significant reduction in these voluntary measures would undermine their capacity to handle those complaints which require full investigation and hearing. Cf. *Allen v. State Board of Elections* 393 U.S. 544, 556 (1969). For example, in fiscal year 1979 *amici* received 7,970 complaints of discrimination in employment, approximately 985 or 12 percent of which were complaints against state (283) and local (702) governmental entities. In fiscal year 1980, *amici* received 8,970 complaint, approximately 1,037 or 12 percent of which were against state (237) and local (800) governmental entities. To handle this case load, presumably adequately safeguarding the rights of the parties involved, the Department has 91 investigators and 13 attorneys. The Commission employs 5 professional staff attorneys.[2]

Amici have received the written consent of the petitioners and respondents to file this Brief. Copies of the letters received are contained in Appendix A.

SUMMARY OF ARGUMENT

The 1972 Amendments to Title VII contemplate that public and private employers not only are subject to the same standards of liability for determining unlawful discrimination, *see e.g., Dothard v. Rawlinson* 433 U.S. 321 (1977), but also have the same opportunity to correct such unlawful conduct by implementation of voluntary affirmative action plans. Just as nothing in Title VII prohibits private employers from implementing appropriate race-sensitive or sex-sensitive affirmative action programs, *see United Steelworkers v. Weber* 443 U.S. 193 (1979), nothing statutorily pro-

[2]By statute, *amici* have jurisdiction over private employers and both state and local governmental entities. Cal.Lab. Code § 1413(d) (West Supp. 1980). The constitutionality of the Legislature's delegation to *amici* of jurisdiction over state employment covered by the California civil service is currently the subject of litigation. *State Personnel Board v. California Fair Employment Practice Commission*, 3 Civil 19549 (Cal. Ct. App., filed April 14, 1980).

hibits public employers from taking similar action under appropriate circumstances and in an appropriate manner.

Nor does the Constitution pose additional restrictions on the ability of public employers to remedy the effects of past discrimination. Every court that has addressed the issue has concluded that the 1972 Amendments represent a constitutional exercise of authority by Congress under § 5 of the Fourteenth Amendment. *E.g., Fitzpatrick v. Bitzer* 427 U.S. 445 (1976). Chief Justice Burger's lead opinion in *Fullilove v. Klutznick*, 65 L.Ed.2d 902 (1980), holds that Congress may enact legislation which not only requires states to take certain action but also expands the scope of constitutionally permissible action that they may undertake to avoid unlawful conduct. Thus, *amici* conclude that the constitutional limits on a state's use of an affirmative action employment program are no different than the limits established by Congress under Title VII.

Given the terms of Title VII and Congress' authority to enact remedial legislation which goes further than the substantive provisions of the Fourteenth Amendment, *amici* maintain that knowledge of significant minority or female under representation, unexplained by a business necessity that is likely to rebut a *prima facie* Title VII violation, is sufficient to warrant the institution of affirmative action remedies in public employment. Since the California Department of Corrections' program was designed to remedy significant minority and female representation in a manner that fully meets the *Weber* criteria, it is a statutorily and constitutionally permissible plan.

ARGUMENT

VOLUNTARY PUBLIC EMPLOYMENT AFFIRMATIVE ACTION PROGRAMS WHICH CONFORM WITH GOVERNING LEGISLATION THAT IS CONSTITUTIONAL ARE NOT CONSTITUTIONALLY INFIRM

In reviewing the constitutionality of race-sensitive affirmative action plans by public entities, the justices of

this Court have taken very different approaches. In *University of California Regents v. Bakke,* 438 U.S. 265 (1978), where the challenge was to the Davis Medical School's admissions program, there were 5 separate opinions filed. Last term in *Fullilove v. Klutznick,* ..... U.S. ....., 65 L.Ed.2d 902 (1980), which involved a 10% minority business enterprise set aside for all contracts let under grants to local governments pursuant to the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, there were 5 separate opinions. In neither case did any one opinion enjoy the support of a Court majority. This lack of even a minimal consensual viewpoint is due in part to the conceptual complexity underlying what is a new generation of constitutional issues in the continuing legal and social struggle to end discrimination against traditionally excluded groups.

In the past this Court focused most frequently on statutory schemes and governmental and private actions that separated, excluded, and, in effect, stigmatized minority group members. *E.g., Plessy v. Ferguson,* 163 U.S. 537 (1896); *Brown v. Board of Education,* 347 U.S. 483 (1954); *Jones v. Mayer,* 392 U.S. 409 (1968); *Loving v. Virginia,* 388 U.S. 1 (1967). The conceptual issues raised largely concerned the definition and establishment of a constitutional wrong. In the instant case, as in *Bakke* and *Fullilove,* the issues arise in a remedial context, where a governmental entity through the explicit consideration of race and sex seeks to redress the clear and substantial underrepresentation of minorities and women in fields of public opportunity.

These cases do not concern standards of proof for determining constitutional liability, as addressed by this Court in *Washington v. Davis,* 426 U.S. 229 (1976), but rather they involve the scope of permissible constitutional action by public agencies when, absent a court order, they seek to remedy the continuing effects of past discrimination.

There is no question that a court may order a private or public agency to devise and implement a race-sensitive remedy. Even in dissent in *Fullilove v. Klutznick*, 65 L.Ed. 2d at 954-955 n.4, Justice Stewart stated, "A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race. *See Teamsters v. United States,* 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18-32 (1971)."

It is also clear from this Court's decisions that race-sensitive remedies initiated by other governmental entities are not *per se* unconstitutional. *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977); *University of California Regents v. Bakke,* 438 U.S. 265 (1978); *Fullilove v. Klutznick,* 65 L.Ed.2d 902 (1980). This position stems in part from this Court's often-stated view that public agencies have a legitimate interest, in some instances even a duty, to take remedial action when they knew or should have known about the racially discriminatory consequences of past policies and practices. *See McDaniel v. Barresi,* 402 U.S. 39, 41 (1971); *Board of Education v. Swann,* 402 U.S. 43, 45-46 (1971); *Green v. County School Board,* 391 U.S. 430, 437-438 (1968).

Last term in dealing with legislatively initiated action, a majority of this Court's justices, albeit for different reasons, found that Congress has considerable latitude when it seeks to redress racial underrepresentation through the utilization of a race-sensitive remedy. See the various opinions of Chief Justice Burger and Justices Powell and Marshall in *Fullilove v. Klutznick,* 65 L.Ed.2d at 908 (Burger, C.J.), at 935 (Powell, J.), at 949 (Marshall, J.). Similar latitude has also been extended to state legislatures acting under Congressional mandate. *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977). The questions now

before the Court concern the constitutional latitude to be afforded a state executive agency when, consistent with federal and state legislative goals, it seeks to redress racial and sexual imbalances in its work force.

In the instant case, the California Department of Corrections instituted a race-sensitive and sex-sensitive affirmative action plan to end what its top executives' regarded as substantial underrepresentation of minorities and women in its employment force, particularly the correctional force. The plan was adopted on July 1, 1974, some two years after the 1972 Amendments to the Civil Rights Act of 1964 extended Title VII coverage to discrimination in public as well as private employment. It also follows by 25 years California's enactment of its Fair Employment Practice Act, Cal. Lab. Code §§ 1410-1432 (West 1971 & Supp. 1980). During the pendency of this litigation, the California Legislature amended the Civil Service Act to underscore explicitly that affirmative action plans by state agencies are in accord with the state's commitment to the eradication of discrimination. Cal. Gov't Code §§ 19790-19797; *see also Price v. Civil Service Commission*, 26 Cal. 3d 257 (1980), *appeal dismissed as moot*, ... U.S. ..... (1980). In short, the actions now challenged did not occur in a legislative vacuum. They represent the efforts of an administrative agency to carry out not only its constitutional responsibilities to end the effects of discrimination but those responsibilities as further spelled out by Congress and the California Legislature.

In analyzing the constitutionality of the Department of Corrections' affirmative action plan, *amici* turn first to what remedies federal and state legislation either require or permit state agencies to undertake in order to end employment discrimination.

Amici then discuss the constitutionality of Title VII as it applies to public employers. It is *amici's* position that Department actions which conform with governing legisla-

tion that is constitutional are not constitutionally infirm. Otherwise, there is a constitutional double bind, where what the Fourteenth Amendment authorizes Congress and the states to undertake is found unconstitutional when carried out by administrative agencies charged with implementing legislative policy.

Lastly, *amici* address the factual circumstances and specific nature of the Department's affirmative action plan to determine whether it is consistent with governing legislation and thus the Constitution.

A. BOTH TITLE VII AND CALIFORNIA LEGISLATION PERMIT THE USE OF RACE-SENSITIVE AND SEX-SENSITIVE AFFIRMATIVE ACTION PROGRAMS BY PUBLIC EMPLOYERS

1. Private Sector and Public Sector Affirmative Action Programs Are Equally Permissible Under Title VII

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court upheld Kaiser Aluminum's affirmative action plan against a Title VII challenge mounted by a white employee excluded from a Kaiser crafts training program. The *Weber* Court did not address the legality of such a plan if enacted by a public agency. However, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a case involving the exclusionary effects of weight and height requirements on women seeking jobs as Alabama Correctional Counselors, the Court held that Title VII applies equally to public and private employers.

The legal issue in *Dothard* concerned the applicability in public employment discrimination cases of the adverse impact standard for determining a *prima facie* Title VII violation, as articulated in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), and *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), following the 1972 Amendments to Title VII. Citing the relevant legislative history,

the Court stated, ". . . Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R.Rep. No. 92-238, p. 17 (1971); S. Rep. No. 92-415, p. 10 (1971)." *Dothard v. Rawlinson*, 433 U.S. at 332, n. 14. The decision to extend Title VII to public employment was based on the Congressional finding "that wide-spread discrimination against minorities exists in State and local government." H.R.Rep. 92-238, 1972 U.S. Code Cong. and Admin. News, pp. 2137, 2152.

Chief Justice Burger's opinion in *Griggs* succinctly sets out the fundamental principles which animate Title VII, and which are now applicable to public as well as private employers.

> 1. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. at 430.
>
> 2. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.
>
> 3. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.
>
> "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." (Emphasis in original.) *Ibid.*

Consequently, since the 1972 Amendments public employers and private employers alike are liable for Title VII

violations even in the absence of discriminatory intent if they cannot meet the burden of showing that the discriminatory impact of their employment practices arises from an employment requirement necessary to the operation of their agency. Because purposeful discrimination need not be shown, statistics alone are sufficient to establish a *prima facie* case of employment discrimination in the public sector. *See Scott v. City of Anniston, Ala.*, 597 F.2d 897 (5th Cir. 1979); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1372-1373 (9th Cir. 1979); *United States v. City of Chicago*, 573 F.2d 416, 420-424 (7th Cir. 1978).

While this Court has repeatedly made clear its view that adverse discriminatory impact, when unrefuted by sufficiently job-related business employment requirements, will support the finding of a Title VII violation, and that such finding may lead to court-imposed hiring and promotional goals, *e.g., Albermarle Paper Company v. Moody*, 422 U.S. at 418, it has also emphasized the wisdom of voluntary compliance as an alternative to litigation. Perhaps the most quoted statement to this effect is found in *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974):

> "Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. [Citations omitted.] Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a law suit."

The remedial scheme established by Title VII, in short, expresses a strong preference for voluntary compliance to root out the present exclusionary consequences of past employment practices. This expressed preference extends to both public and private employment. See H.R. Rep. 92-238, *supra,* at 2152-2154.

In *Weber*, this Court forcefully acknowledged that voluntary affirmative action programs were an integral part of Title VII's emphasis on voluntary compliance. Speaking for the majority, Justice Brennan stated,

> "[W]e cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to examine and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history,' [citation omitted] cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' [citation omitted] constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Weber,* 443 U.S. at 204.

If the sections of Title VII relied on by respondent in *Weber* do not prohibit race-sensitive affirmative action by private parties, there is no basis in light of the 1972 Amendments to Title VII to import additional statutory restrictions on public employers who undertake similar

action. Indeed, the 1972 Amendments are noteworthy in this regard not only because they extended Title VII coverage in its entirety to state and local employment but also because Congress, at the same time, specifically rejected attempts to restrain the courts from imposing quota remedies on findings of adverse impact alone. *See United States v. International Union of Elevator Constructors,* 538 F.2d 1012 (3rd Cir. 1976), for a brief summation of this history.

The *Weber* decision substantially lessened the quandary faced by private employers confronted with a disproportionate small percentage of minority and female employees, but hesitant to implement a voluntary affirmative action plan for fear of triggering a reverse discrimination action prosecuted by non-minority employees. Similarly, it makes no sense to leave public employers in what otherwise is the same statutory bind. They equally need the opportunity to correct potential Title VII violations without fear of a reverse discrimination suit.

Not surprisingly, those appellate courts which since *Weber* have ruled on voluntary affirmative action plans in the public sector have not hesitated to apply the full force of the *Weber* analysis when reviewing the permissibility of the specific plans under attack. *Price v. Civil Service Commission,* 26 Cal.3d 257 (1980), appeal dismissed as moot ..... U.S. ..... (1980); *Maehren v. City of Seattle,* 599 P.2d 1255 (1974); *Detroit Police Officers Association v. Young,* 608 F.2d 671 (6th Cir. 1979), *petn. for cert. filed* ..... U.S. ....., 48 U.S.L.W. 3558 (Jan. 10, 1980) (No. 79-1089); *see also United States v. City of Miami,* 614 F.2d 1322 (5th Cir. 1980). As Justice Keith of the Sixth Circuit sitting as a trial judge noted:

> "Title VII as applied to the public sector in 1972 is the same statute which the court interpreted in *Weber* as not barring voluntary affirmative action. And, unlike the uncertain 1964 legislative history reviewed by the

> Court in *Weber,* the 1972 legislative history clearly demonstrates Congress' approval of race-conscious remedies for past discrimination." *Baker v. City of Detroit,* 483 F.Supp. 930, 986, n. 105.

From a statutory standpoint, there is no basis for distinguishing the permissibility of affirmative action plans in the public sector from their permissibility in the private sector.

2. California Legislation Specifically Authorizes The Use Of Race-Sensitive Or Sex-Sensitive Affirmative Action Programs By State Agencies

The California legislature acted years before Congress to prohibit discrimination on the basis of race by private and public employers in California,[3] and to prohibit discrimination on the basis of race and sex in the state civil service.[4] After the enactment of Title VII, the legislature extended the prohibition against sex discrimination to private and local governmental employers as well.[5] The legislature also acted in the wake of this Court's opinion in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) to prohibit, respectively, any state or local agency's use of "educational prerequisites or testing or evaluation methods which are not job-related unless there is no adverse effect."[6]

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[3]*See* Fair Employment Practice Act, ch. 121, § 1, 1959 Cal. Stats. 1999 (current version at Cal. Lab. Code §§ 1413(d), 1420 (West Supp. 1980)).

[4]*See* Civil Service Act, ch. 123, § 1, 1945 Cal. Stats. 571 (current version at Cal. Gov't. Code § 19702 (West Supp. 1980)).

[5]*See* Fair Employment Practice Act, ch. 1508, § 4, 1970 Cal. Stats. 2995 (current version at Cal. Lab. Code §§ 1413(d), 1420 (West Supp. 1980)).

[6]*See* Government Code §§ 19702.2, 50085, Ch. 915, § 4, 1972 Cal. Stats. 1636; *see also* Hiring Practices: Legislative Review, 4 Pac. L.J. 629 (1973).

In the Spring of 1971, only weeks after the *Griggs* opinion came down, the Assembly Committee on Employment and Public Employees had held two days of hearings to consider whether the State of California's employment practices were discriminatory. *Hearings Relating to Charges of Discrimination in State Hiring Practices Before the California Assembly Committee on Public Employment and Public Employees (1971)*. The Committee had concluded that the State Personnel Board's practices probably had an unjustified, adverse impact on minorities. *Id* at 12, 17-18, 25-26.

With respect to the legality of affirmative action plans, the California Supreme Court has interpreted the State's basic anti-discrimination statute, the Fair Employment Practice Act (FEPA), as not prohibiting race-sensitive plans. *Price v. Civil Service Commission,* 26 Cal.3d at 276. In reaching this conclusion, the Court noted the similarity between the FEPA and Title VII and the fact that in some respects the FEPA goes further than Title VII in supporting the use of affirmative action. The Court observed:

> "Although the United States Supreme Court's interpretation of the antidiscrimination provisions of Title VII does not, of course, necessarily determine the appropriate interpretation of the antidiscrimination provisions . . . of the FEPA, we believe that those provisions should similarly not be interpreted to bar all such race-conscious affirmative action plans. First, the relevant provisions of . . . the FEPA arose out of the same historical context as the federal Civil Rights Act and were intended to achieve the same general objectives as the antidiscrimination prohibitions contained in the federal law. Second, additional features in . . . the FEPA demonstrate that [its] general ban on employment discrimination did not propose to inhibit the promulgation of effective affirmative action programs. . . . [For example] a recent legislative amend-

> ment of the FEPA specifically cautions that the statutory provision 'shall not be interpreted in such a manner as to adversely effect otherwise lawful state or federal programs which benefit the physically handicapped, the aged, low-income individuals, *minorities,* or women.' " [Citation omitted.] *Ibid.*

In 1977, the legislature added a new chapter to the Civil Service Act, entitled "State Civil Service Affirmative Action Program." Cal. Gov't Code §§ 19790-19797 (West Supp. 1980); *see* Ch. 943, § 2, 1977 Cal. Stats. 2876. The initial provision of the chapter, section 19790, provides in part: "Each agency and department is responsible for establishing an affirmative action program.... *Each agency and department shall establish goals and timetables designed to overcome any identified under utilization of minorities and women in their respective organizations.*" (Emphasis added.) This provision, in effect, represents legislative ratification of the course of action already undertaken by the California Department of Corrections, which is under challenge in the instant case.

In California, for state agencies, affirmative action is not just a permissible course of action but is now absolutely mandatory when there is an identifiable under-utilization of minorities or women. As discussed in the next section of this brief, this Court has been very solicitous of a state's use of racial criteria so long as it comports with and is reasonably tailored to accomplish the purposes of the Fourteenth Amendment. *See United Jewish Organizations v. Carey,* 430 U.S. 144 (1977).

B. THE FOURTEENTH AMENDMENT AUTHORIZES CONGRESS TO UNDERTAKE REASONABLE AND APPROPRIATE ACTION TO REMEDY THE CONTINUING EFFECTS OF PAST DISCRIMINATION

1. The Limitations Of The Fourteenth Amendment And Title VII On The Use Of Race-Sensitive Or Sex-Sensitive Remedial Programs Are Co-Extensive

As spelled out in Section A-1 of this brief, the 1972 Amendments to Title VII contemplate that public and private employers not only are subject to the same standards of liability for determining unlawful discrimination but also have the same opportunity to correct such unlawful conduct through the development of voluntary affirmative action plans. Just as nothing in Title VII prohibits private employers from implementing appropriate race-sensitive affirmative action programs, *United Steelworkers v. Weber*, 443 U.S. at 208, nothing statutorily prohibits public employers from taking similar action under appropriate circumstances and in an appropriate manner. The main issue here, therefore, is whether the Constitution poses additional limitations on the ability of public employers to remedy the effects of past discrimination, not applicable in the private sphere.

A threshold issue concerns the constitutionality of the 1972 Amendments. Without much explication, this Court already has acknowledged that the 1972 Amendments represent a constitutional exercise of authority by Congress under § 5 of the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court upheld the 1972 Amendments against a challenge that the Eleventh Amendment barred application to the states of provisions for awards of backpay and attorneys' fees, while in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), without explicitly addressing the constitutional issue, the Court extended the adverse impact standard or *Griggs* test for establishing a *prima facie* Title VII violation to the public sector.

The Court's sanguine view regarding the 1972 Amendments is in large part due to the broad power conferred upon Congress by Section 5 of the Fourteenth Amendment to enact more sweeping measures to remedy past discrimination than the minimum safeguards provided by the substantive provisions of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966). Given the prerogatives accorded Congress under Section 5, each of the federal Courts of Appeals which, after *Dothard*, has explicitly addressed the constitutionality of Congress' extension of the adverse impact standard to state agencies has upheld it. *See United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979); *Scott v. City of Anniston, Ala.*, 597 F.2d 897 (5th Cir. 1979); *Firefighters Institute for Racial Equality v. City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied sub nom. Banta v. United States*, 434 U.S. 819 (1979). As the Seventh Circuit stated and the Ninth Circuit reiterated: "[S]ince the 1972 Amendments are clearly rationally related to and consistent with 'the letter and spirit' of the Fourteenth Amendment, and the means chosen were not in themselves unconstitutional, . . . Congress could constitutionally incorporate the *Griggs* test into the 1972 Amendments." *United States v. City of Chicago*, 573 F.2d at 423-424; *Blake v. City of Los Angeles*, 595 F.2d at 1373-1374. There appears to be no dispute within the federal appellate judiciary that the requirements of Title VII as they apply to public entities are constitutionally sufficient, including the extension to the public sector of a lesser standard of intentionality for proving employment discrimination than required to establish a direct constitutional violation.

The issue in the instant case, however, does not involve what Title VII requires but rather what it permits state agencies to undertake in an effort to remedy the effects of past discrimination. In this regard Chief Justice Burger's lead opinion in *Fullilove v. Klutznick*, 65 L.Ed.2d at 908, is

especially helpful. There the issues concerned the constitutionality of Congress' minority set-aside program in the letting of public works contracts, a remedial device which parallels the use of race-sensitive or sex-sensitive remedies under Title VII.[7]

In discussing the inter-relationship between Congressional legislation and the Fourteenth Amendment, Chief Justice Burger in *Fullilove* placed great weight on the substantial latitude that Congress has to substitute its standards for determining and remedying unlawful discrimination for those directly provided by the Constitution. In support of this analysis, he stressed this Court's decisions in various Voting Rights Act cases. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *City of Rome v. United States*, ... U.S. ....., 64 L.Ed.2d 119 (1980). In particular, he underscored the authority of a state to "employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation." *Fullilove v. Klutznick*, 65 L.Ed.2d at 927. *See also United Jewish Organizations v. Carey*, 430 U.S. at 147-165 (opinion of Justice White joined by Justices Brennan, Blackmun and Stevens). Summing up his view regarding the general remedial consequences for state agencies of Congressional legislation to end discrimination, the Chief Justice stated:

---

[7]Though Title VII does not specifically authorize the application of race and sex sensitive remedies, Congress at the time of the 1972 Amendments explicitly rejected any prohibition or additional limitations on their use. *See* Note, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 *University of Chicago Law Review* 723 (1972). Far from being outside the remedial scheme of Title VII, race and sex sensitive remedies are an integral part of Title VII in a manner not dissimilar from the 10% minority set-aside contained in the Public Works Employment Act of 1977.

> ". . . It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct." *Fullilove v. Klutznick,* 65 L.Ed.2d at 928.

In other words, Congress is able to enact legislation which not only requires states to take certain action but also expands the scope of constitutionally permissible action that they may undertake to avoid unlawful conduct.

As this Court found in *Weber,* race-sensitive remedies, when properly tailored and appropriately applied, are part-and-parcel of the remedial scheme established by Congress to redress employment discrimination. The 1972 Amendments to Title VII, which brought state employment within the confines of this remedial scheme, already have been upheld as constitutional. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). In light of this Court's decisions concerning other civil rights legislation enacted by Congress, the constitutional limits on a state's use of a race-sensitive or sex-sensitive affirmative action plan in employment are no different than those limits established by Congress. *See Fullilove v. Klutznick,* 65 L.Ed.2d 902 (1980); *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977). Accordingly, a state need not show that there is a direct constitutional violation before utilizing racial or sexual criteria. *See South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *City of Rome v. United States,* 64 L.Ed.2d 119 (1980).

In *University of California Regents v. Bakke,* 438 U.S. 265 (1978), five justices (Brennan, White, Marshall, Black-

mun and Powell) agreed that Title VI of the Civil Rights Act of 1964 went no further in prohibiting the use of race than the equal protection clause of the Fourteenth Amendment itself. *Id.* at 325. Given the particular remedial scheme of Title VII, the converse in the instant case is equally true: That is, the Fourteenth Amendment goes no further in prohibiting the use of race than Title VII. In short, if a public employer's use of a race- or sex-sensitive remedy is in conformity with Title VII, it is constitutionally sufficient.

2. Affirmative Action Programs Which Meet The Weber Criteria And Which Seek To Rectify Significant Minority Or Female Underrepresentation In The Work Force Are Constitutional

The specific legal issues left to be considered are the circumstances that warrant a state agency voluntarily undertaking race-sensitive and sex-sensitive remedial action and the type of affirmative action program that is legally supportable.

This latter issue was essentially settled in the *Weber* case, when this Court set out four general criteria for determining "the line of demarcation between permissible and impermissible affirmative action plans." *United Steelworkers v. Weber,* 443 U.S. at 208. First, the plan has to be designed "to break down old patterns of racial segregation and hierarchy." Second, it cannot "unnecessarily trammel the interest of white employees," such as requiring their discharge. Third, it cannot create "an absolute bar to the advancement of white employees." And fourth, it has to be a temporary measure. *Ibid.* Given the symmetry of Title VII's applicability to private and public employers, there is no arguable basis for not applying these same criteria to race-sensitive or sex-sensitive affirmative action programs implemented by governmental agencies. *Price v. Civil Service Commission,* 26 Cal. 3d at 274-276; *Maehren*

v. City of Seattle, 599 P.2d at 1269; *Detroit Police Officers Association v. Young,* 608 F.2d at 696.

The type of situation that supports the remedial use of racial or sexual classifications by a public entity is, however, a muddied issue. There appears to be no consensus among the justices of this Court as to what interest and what findings are needed before a state agency may institute an affirmative action remedy. Within the relatively clear confines of Title VII, the Court has here an opportunity to reach just such a consensus.

As previously discussed, the Court already has upheld the application of the adverse impact standard in public employment discrimination cases. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). Consequently, significant underrepresentation of minorities or women in a governmental job category places the government agency involved in a precarious position with respect to Title VII liability. It would indeed be a strained reading of the Constitution if governmental agencies under such circumstances were not able to take appropriate action to correct the very conduct Title VII prohibits and seeks to redress. *Cf., Fullilove v. Klutznick,* 65 L.Ed.2d at 932. It is *amici's* position, therefore, that knowledge of significant minority or female underrepresentation, unexplained by a business necessity that is likely to rebut a *prima facie* Title VII violation, is sufficient to justify the development and implementation of a race-sensitive or sex-sensitive affirmative action program.

This position is similar to the one advocated by Justice Brennan on behalf of himself and Justices White, Marshall and Blackmun in *Bakke,* when he stated:

> [A] state government may adopt race-conscious programs if the purpose . . . is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. *Bakke,* 438 U.S. at 369.

It is a rare situation when significant minority or female underrepresentation is not, at the very least, a strong indication of the lingering effects of past societal discrimination.

Amici's position is also not inconsistent with positions endorsed on different occasions by Justices Stevens, Stewart and Rehnquist and Chief Justice Burger. In *Bakke,* these justices expressed no view on the permissibility of race-sensitive affirmative action plans in public employment. In other governmental contexts, however, they all have supported the remedial use of racial criteria to benefit minorities, so long as the plan adopted was consistent with Congressional or state legislation itself constitutional and did not represent a slur or stigma on whites nor constitute purposeful discrimination against whites. *See United Jewish Organizations v. Carey,* 430 U.S. at 165 (White, J.); *id.* at 179-180 (Stewart, J.); *see also Fullilove v. Klutznick,* 65 L.Ed.2d at 929-933 (Burger, C.J.).

Only Justice Powell consistently maintains that before the imposition of a race-sensitive remedy by a governmental agency, there must be a finding of prior international discrimination against the benefitted group or a comparable compelling state interest. *See University of California Regents v. Bakke,* 438 U.S. at 307, 309-310; and *Fullilove v. Klutznick,* 65 L.Ed.2d at 936-937. As will be shown shortly, with respect to the instant case, the record is sufficient to satisfy either *amici's* proposed reformulation of the Brennan test or the Powell test.

In summary, it is *amici's* position that although the *Weber* Court specifically declined to consider the legality of affirmative action employment programs in the public sector, *United Steelworkers of America v. Weber,* 443 U.S. at 200, and, thus, did not discuss the constitutional issues addressed here, the compelling logic of the Court's decision, for all intents and purposes, applies with equal force to affirmative action programs instituted by govern-

mental agencies. Section 5 of the Fourteenth Amendment vests in Congress substantial latitude to exceed the substantive terms of the Amendment in order to accomplish the Amendment's remedial purposes. *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Fullilove v. Klutznick,* 65 L.Ed.2d 902 (1980). So long as Title VII is plainly adapted to that end and consistent with the letter and spirit of the constitution, and so long as the affirmative action program as carried out by a public agency is permissible under Title VII, this Court need look no further to uphold the program's constitutionality.

The Fourteenth Amendment authorizes Congress to undertake reasonable and appropriate action to remedy the continuing effects of past discrimination. Title VII is such legislation equally applicable to public and private employers. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). State action in conformity with Title VII is constitutional.

C. THE CALIFORNIA DEPARTMENT OF CORRECTIONS' AFFIRMATIVE ACTION PLAN FURTHERS THE GOALS OF TITLE VII AND STATE NON-DISCRIMINATION STATUTES AND IS CONSTITUTIONAL

1. This Plan Was Developed In Response To The Significant Underrepresentation of Minorities And Women In The Department's Labor Force

The circumstances confronting the California Department of Corrections in 1974 warranted the voluntary adoption of race-sensitive and sex-sensitive remedial action. In brief, those circumstances were as follows:

(1) There was a significant underrepresentation of minorities and women employed by the Department relative to their representation in the California labor force, particularly at the California prisons and in certain job classifications.[8]

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[8]The California labor force is an appropriate measuring rod since notice of examinations for civil service vacancies are ordinarily

The evidence reveals that historically most of the institutions under the California Corrections Department (CDC) were staffed almost exclusively by white males. C.T. 502; *see also* R.T. 547, 593, 879, 892-893.[9] In 1968, when the CDC initiated its first informal affirmative action efforts, Caucasians constituted approximately 90.5% of the staff. Ex. "Q" at 1. In 1973, minority members totaled 19.8 per cent of total personnel in contrast with 23.7% of the California labor force. Ex. "G" at 26. Looking at the prisons alone—*i.e.*, excluding the parole division and central office—the evidence shows an even greater underrepresentation of minorities, particularly at some institutions. Ex. "G" at 29. With clerical and lower-level positions excluded, the disparity was still more pronounced. Ex. "G" at 21-22, 33-34. For example, of the 186 correctional lieutenants employed in September 1973, 95 per cent were Caucasian; of 400 correctional sergeants, 89 per cent were Caucasian; of 33 Correctional Counselor III's, 94 per cent were Caucasian. *Id.* at 34.

Much the same was true for CDC's female employees. In 1973, only 17.3 per cent of the total personnel were female in contrast with 38.1 per cent of the California labor force. Ex. "G" at 27. Again looking at the prisons alone, at only two institutions (one of which was the California Institute for Women) did the proportion of females exceed 13 per cent. Ex. "G" at 31. Moreover, more than 75 per cent of the female employees were in clerical positions. Ex. "G" at 35.

(2) There was a substantial underrepresentation of minorities in comparison to their representation in the

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distributed throughout the state. *Hearings Relating to Charges of Discrimination in State Hiring Practices Before the California Assembly Committee on Employment and Public Employees* 1, 19-29 (April 28, 1971).

[9]C.T. refers to the Clerk's Transcript in this case; R.T. refers to the Reporter's Transcript; Ex. as used subsequently refers to the Trial Exhibits contained in the record on appeal.

prison inmate population which impaired, *inter alia,* the Department's ability to combat racial violence in the prisons and maintain prison security.

Indeed, the evidence reflects a sharp contrast between the minority inmate population and the correctional work force. In 1976, the total inmate population contained 32 per cent blacks, in contrast to 10.7 per cent within the correctional force, and 21 per cent Mexican-Americans, in contrast to 9.8 per cent in the work force. *See* Ex. "K" at 9, 10. At many institutions, the disparity was even greater. *See* Ex. "K" at 8.

Testimony adduced during the trial below established as well the pervasive presence of racial gangs in California's prisons, R.T. 340-41, 476, 560, 627, 899, and the ever-present danger of racial violence. *E.g.,* R.T. 548-64, 896-99. Major disturbances have brought the racial tensions that plague the prisons and the manner in which prison conditions themselves foster violence forcefully to public attention. *See, e.g.,* New York State Special Commission on Attica, *Attica*: *The Official Report,* 39-40, 79-82, 106-07 (1972). *See also, Wolff v. McDonnell,* 418 U.S. 539, 561-62 (1974).

Finally, both the evidence and the academic and legal literature confirm the Department's view that the presence of minority officers would reduce inter-racial friction and violence by improving inmate-officer communication, *e.g.,* R.T. 478-79, 550, 564-65, 591, 654-55, 842, 846-47, 853, 893-99, 903, rapport, *e.g.,* R.T. 324-25, 343-44, 383, 892-901, and understanding, *e.g.,* R.T. 896-97. *See generally* Keldgord, "New Directions for Corrections," 36 *Fed. Probation* 3 (1972).

(3) In 1972, the California Legislature amended the Civil Service Act to make the *Griggs* impact standard clearly applicable to state agencies. *See* Cal. Gov't Code § 19702.1 (West Supp. 1980). Thus when the CDC adopted

this plan in 1972, the agency was under an explicit state duty to remedy the underrepresentation of minorities and women in its work force.

(4) There was, in addition, evidence of prior race and sex discrimination within the Department itself. *E.g.,* R.T. 212-13; 370-372; 706-708; 867-73.

(5) Finally, public records establish that the Department had utilized male sex as a requirement for the position of correctional officer and that this requirement had not been validated as a bona fide occupational qualification. Michael Frost, the Assistant Secretary of the State Personnel Board, so testified in the Fall of 1974:

> [T]he two classes where sex has been a requirement are California Highway Patrol Officer and Correctional Officer in the Department of Correction. With both of those now there are programs to get females in these occupations. So that—but they have not been part—if you are asking have they been part of the validation process that we have gone through, no, they have not. . . . *Hearings Relating to Equal Employment Opportunity In State Service Before The Assembly Committee on Employment and Public Employees* 1, 42-43 (1974).

In sum, the circumstances confronting the Department in 1974 support its voluntary adoption of a race-sensitive and a sex-sensitive affirmative action plan. The Department knew there was significant underrepresentation of minorities and women in its labor force and had reason to believe this underrepresentation was not justifiable by any legitimate operational need. This situation certainly falls within the ambit of the Brennan test set forth in *Bakke,* particularly as reformulated by *amici.* Moreover, the Department's interests in maintaining prison security and reducing prison violence are sufficiently compelling to satisfy Justice Powell's prerequisites, especially if the Court takes judicial notice of the Department's post-trial admission of prior discrimination.

2. The California Department Of Corrections' Plan Fully Meets The Weber Criteria As To What Constitutes A Permissible Affirmative Action Plan

The *Weber* criteria require that a race or sex-sensitive affirmative action plan be designed to break down old patterns of racial segregation and hierarchy, not unnecessarliy trammel the interests of white employees nor bar their advancement, and be temporary. See Section B-2 of this Brief, at p. 20. A plan which satisfies these requirements is both statutorily and constitutionally permissible.

First, as demonstrated above, the CDC's objective of increasing significantly the utilization of minorities and women across organizational units of the correctional system and at all levels, as possible vacancies occur, *see* Ex. "G" at 1, was structured to eliminate conspicuous racial and sexual imbalances within the CDC, particularly in those occupations and departmental levels from which minorities and women had traditionally been excluded. Furthermore, additional evidence of past discriminatory practices within the Department further substantiates the remedial nature of the plan.

Second, the CDC's plan does not unduly trammel the rights of non-minorities or males, since it contemplates neither the discharge of non-minority or male workers nor their replacement with minority or female employees. *See* Ex. "G" at 1. Likewise the plan does not call for the selection of unqualified applicants over qualified ones. The plan operates within the bounds of conventional civil service rules. Any promotional or hiring selection CDC might make pursuant to the plan can only be from among persons already determined to be qualified and equally eligible for

a position.[10] Transfers are similarly governed. Cal. Gov't. Code § 19360 (West Supp. 1980).

Third, the plan is not an absolute bar to the advancement of non-minorities or males. In selecting from among equally eligible applicants, race or sex is only one factor among many considered. Under the plan, minority status and feminine gender represent a "plus" in an applicant's file but do not insulate the individual from comparison with all other applicants. *See* R.T. 195-97, 382-83, 488, 666-77, 707-08. Thus on its face the plan creates no absolute bar to the hiring, promotion or transfer of non-minority or male personnel. Rather the full qualifications of each applicant are to be considered in the light of the Department's needs.

It is true that the plan established specific goals. These were to arrive at a proportion of the women in the correctional workforce equal to their proportion in the California labor force and to arrive at a proportion of each minority group equal to 70 percent of its proportion in the inmate population. Ex. "G". Goals which seek the same percentage of minorities or women among employees as there are among the workforce, however, are ordinarily reasonable benchmarks. "[I]t is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the . . . composition of the population in the community. . . ." *Team-*

[10]Under civil service rules, when notified of a vacancy the State Personnel Board must certify to an appointing authority such as CDC either the names of the three individuals standing highest on the applicable employment list, or in some cases, the names of all individuals standing in the three highest ranks on the applicable list. Cal. Gov't Code §§ 19057, 19057.1 West Supp. 1980). The appointing authority has full discretion as regards selection from among the persons so certified. *Id.* The employment list from which such names are certified consists of all those who passed the qualifying examination which in turn is open to all who meet the minimum qualifications for the job. Cal. Gov't. Code §§ 18900, 18937 (West 1963).

sters v. United States, 431 U.S. 324, 339 n. 20 (1976). Moreover, the goal for minorities was substantially related to the attainment of legitimate and substantial interests of the Department, to wit: the reduction of violence and racial conflict within the state prison system, and maintenance of prison security.

Fourth, CDC's plan is temporary. Contrary to petitioner's assertion (see Petitioner's Brief at 39) the plan was not to be of unlimited duration. Like the *Weber* plan it was not intended to maintain racial or sexual balance, but rather to eliminate a manifest imbalance in the department's workforce particularly at various levels and in various occupations. Accordance of some weight to an applicant's sex or race in selection decisions was to end when the percentage of women in the workforce approximated the percentage of women in the California workforce in 1970, and the percentage of minorities approximated 70 per cent of their representation in the inmate population. Moreover, the plan itself provided that it was targeted to last only five years.

Finally, it is also important to note that any misapplication of the plan can be promptly and adequately remedied administratively. The Civil Service Act empowers the State Personnel Board to conduct investigations and to hold hearings concerning all matters relating to the operation of the civil service system. *See* Cal. Gov't. Code §§ 18670-18682. In addition, the facts of this case demonstrate that the CDC was itself responsive to complaints that the plan was being misapplied. When such incidents were brought to the attention of responsible administrators within the Department, they were promptly corrected. R.T. 684-86; *see also* R.T. 775-77, Exs. 35, 37. Thus the administrative review process available under the Civil Service Act and the Department's own responsiveness to misguided applications of the plan gives reasonable assurance that its operation can be limited to accomplishing its legiti-

mate and remedial objectives and that any misapplication can be [and was] remedied promptly. *See Fullilove v. Klutznick,* 65 L.Ed.2d at 926. In this regard, *amici* believe it is telling that there is no individual before this Court who was deprived of, or denied any employment benefit by operation of the plan. *See* R.T. 921, 1335-36, 1339.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that this Court affirm the judgment below and hold that public as well as private employers may voluntarily adopt race-sensitive and sex-sensitive affirmative action plans to remedy the significant underrepresentation of minorities and women in their labor force, so long as such plans meet the *Weber* criteria.

Respectfully submitted,

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(Appendix A follows)

Appendix A

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August 1, 1980

Mark N. Aaronson
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625 Market Street, Suite 1208
San Francisco, CA 94105

Re: Minnick v. California Department of Corrections, No. 79-1213

Dear Mr. Aaronson:

The petitioners in the above-entitled case hereby consent to San Francisco Lawyers' Committee for Urban Affairs filing an *amicis curiae* brief on behalf of the California Department of Fair Employment and Housing and the California Fair Employment and Housing Commission, in support of the respondents.

Very truly yours,
Carroll, Burdick & McDonough

/s/ Gary M. Messing
Gary M. Messing

GMM/jmp

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August 14, 1980

Mark Aaronson, Esquire
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Re: Minnick v. California Department of Corrections
U. S. Supreme Court, No. 79-1213

Dear Mark:

This letter will serve as confirmation of our conversation of this date wherein I advised you that the California Department of Corrections has no objection to the filing of an *amicus* brief in the above referenced case on behalf of the California Division of Fair Employment and Housing and the Fair Employment Practices and Housing Commission. As you know, the deadline for filing a brief supporting the position of the Department is October 15, 1980.

Very truly yours,

/s/ Steven L. Mayer
Steven L. Mayer

SLM/lmc

Supreme Court, U.S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

IN THE

Supreme Court of the United States

October Term, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,

Petitioners,

—v.—

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS FIRST APPELLATE DISTRICT—DIVISION FOUR

BRIEF FOR *AMICUS CURIAE* CITY OF DETROIT

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No. 79-1213

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

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On Writ of Certiorari to the California Court of Appeals First Appellate District Division Four

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BRIEF FOR AMICUS CURIAE CITY OF DETROIT

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Interest of Amicus *

The City of Detroit, on whose behalf this brief is filed, is a municipality whose law

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* Letters of consent to the filing of this Brief from counsel for the petitioners and respondents have been filed with the Clerk of the Court.

enforcement agencies, particularly its Department of Police, have worked hard to overcome past discrimination against minorities and women, and the debilitating effects that discrimination has had on the ability of the police to operate. The interest of the City of Detroit stems from the fact that it has instituted an affirmative action plan in its Department of Police. The outcome of this case may have a crucial impact on the constitutionality of that plan. Specifically, pending before this Court is a Petition for Writ of Certiorari in a case which raises issues similar to those posed here, namely, whether the City of Detroit's affirmative action plan for the Department of Police is a constitutionally permissible method of overcoming past intentional discrimination and of meeting the compelling operational need of the Department to safeguard the community and to maintain order. Detroit Police Officers Association, et al. v. Coleman A. Young, et al., No. 79-1080. Counsel for the City of Detroit are attorneys employed by the NAACP Legal Defense and Educational Fund, Inc.

SUMMARY OF ARGUMENT

The threshold problem posed by this case is to determine what race-conscious practices respondents actually utilized. The parties are in disagreement about this, and the courts below made few relevant findings. Because of the fragmented and confusing nature of the record, we have described its contents in detail. In awarding promotions respondents did consider the race and sex of applicants, but only if both (a) the minority or female was as qualified as the best qualified white or male, and (b) there was in fact an operational need for a minority or female in the particular position to be filled. The record does not support petitioners' claim that respondents reserved certain positions for minorities or women.

Department of Corrections officials reasonably concluded that there was a critical need for minority corrections officers. Wardens and superintendents from six California penal institutions, together with the present and past directors of the Department, stated that significant

numbers of minority officers were required to maintain control of the prisons. Every year from 1970 to 1974 an average of 25 inmates or guards were being killed in California's prisons, and much of this violence was racial. To a substantial degree this dangerous racial atmosphere had been caused by overt discrimination and bigotry on the part of white guards. Experience demonstrated that minority officers were essential for avoiding or controlling race riots and other racial incidents. Minority officers were also better able to establish the sort of constructive relationships with minority inmates necessary for maintaining control of the institutions.

The Department of Corrections also adopted its affirmative action policies to overcome the effects of past discrimination against minorities and women in hiring and promotion. Counsel for respondents expressly raised this issue at trial and offered substantial evidence that such discrimination had been serious and widespread.

ARGUMENT

I. THE QUESTIONS PRESENTED BY RESPONDENTS' ACTUAL EMPLOYMENT PRACTICES ARE NOT THE QUESTIONS ASSERTED BY PETITIONERS.

This case presents at the outset a critical problem not posed to a significant degree by the affirmative action cases which this Court has considered in the past. Here, unlike Defunis v. Odegaard, 416 U.S. 312 (1974); Regents of the University of California v. Bakke, 438 U.S. 265 (1978); United Steelworkers of America v. Weber, 443 U.S. 193 (1979) and Fullilove v. Klutznick, ___ U.S. ___, 65 L.Ed.2d 902 (1980), there is a basic and largely unresolved dispute between the parties as to what practices the Department of Corrections actually engaged in under the rubric of affirmative action. The findings of the courts below are of only limited assistance in resolving that issue. The trial court held little more than that there were "preferences" and "discrimination" (Petition, E-2, F-4). The court of appeals noted, but did not pass on, the conflicts in the evidence (id., A-6), and summarized some of the evidence without attempting to distinguish between practices

which implemented the respondents' affirmative action policy and those which violated it (Petition, A-6, A-7).

The petitioners create the impression that specific positions were frequently set aside for minorities or women (Brief for Petitioners, pp. 6-9) and that whenever this was not done, preferences were given to minorities or women who were "substantially" less qualified than competing white males (id. p. 10). The "drastic degree" of these preferences, petitioners assert, is illustrated by what they say is a statement by the Department's Director that "white males would have to wait at least five years to get a promotion" (id., p. 11) (emphasis in original). Not only is there a dispute as to whether the statement was in fact made, but there is no proof of any such delay in the promotion of white applicants. Director Enomoto firmly denied having said that no white males would be promoted for five years (R.T. 284-285),[1/] and his denial was supported by several witnesses.[2/]

1/ "R.T." refers to the reporter's transcript of the trial. "C.T." refers to the clerk's transcript.

2/ R.T. 378, 450. Mr. Minnick, whose testimony

Our review of the record indicates that the Department of Corrections' actual practices bear little resemblance to the picture painted by petitioners. The Department of Corrections, far from excluding white males from promotion, awarded more promotions to that group than to any other;[3/] between half and two-thirds of all those promoted under the Affirmative Action Plan were white and about the same proportion were men (see n. 3, supra).

Because the evidence regarding the Department's actual employment practices is complex and conflicting, and scattered throughout the record, we summarize it in detail.

2/ continued

is cited in this regard by petitioners, asserted only that Enomoto stated increased competition would reduce the number of white males receiving promotions, R.T. 46, and then equivocated about remembering even that. R.T. 47. Only Harry LaFayette alleged Minnick had made the statement asserted in Petitioners' Brief. R.T. 25-26.

3/ Exhibit K, Table 3 (white males received 33% of promotions in the first quarter of 1975); Exhibit L, "Sex and Ethnic Origins of CDC Personnel Promotions" (white males received 41% of

A. Hiring

The critical issue posed by the Department's hiring practices is not what type of special consideration was afforded to minority or female applicants, but whether such consideration was extended at all. Both the complaint and the trial court opinion refer to discrimination in "hiring and promotion",[4/] without distinguishing these two types of employment practices. The detailed allegations regarding the named plaintiffs, however, concerned their unsuccessful applications for promotions (C.T. 7-11), and most of the evidence offered at trial was about promotional practices. The trial court made no detailed findings regarding hiring discrimination.

On appeal the state court of appeals apparently believed that some form of preference had been extended to women and minorites seeking

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3/ continued

promotions in the second quarter of 1975); Exhibit D (in 1975 white males received 66% of all promotions to Correctional Program Supervisor III, and 75% of all promotions to Correctional Program Supervisor II); R.T. 379,381,679.

4/ C.T. 63-82; Petition, E-2, F-4.

promotions, but concluded otherwise regarding hiring. Concerning both women and minorities the appellate court held:

> The exercise of "preference" in their favor in recent years, as described above, was limited to cases involving the promotion, transfer, or work assignments of employees only. There was no substantial evidence of any instance in which it had been exercised in the "initial hiring" of a new employee (Petition, A-7 to A-8).

Referring to the trial court's holding on this subject, the court of appeals stated:

> According to our review of the evidence, it does not support a finding that "preferences result" from the practices in... the "hiring" of employees (id., A-17).

The record fully supports this decision, demonstrating that the key method utilized to increase the hiring of minorities and women was recruiting.[5/] Petitioner sought review of the court of appeals opinion by the state supreme court, but not on this issue.[6/]

5/ R.T. 381, 447, 461, 486, 547, 570; Exhibit C, Appendix B, p. 22, Appendix D, p. C-24; Exhibit G, pp. 1, 6, 7, 8, 11, 15, 16, 41; Exhibit Q, p. 2.

6/ Plaintiffs' Petition for a Hearing by the Supreme Court, pp. 2-3.

The Petition to this Court neither referred to nor complained of the state court finding that no preferences had been extended with regard to hiring. See Petition, pp. 12-13. The Petition sought review of only two aspects of the court of appeals decision: its holding that employment preferences were legally permissible, and its finding of a compelling state interest. Id., p. 3. Neither the Petition nor Petitioners' brief challenges or mentions the factual finding by the California appellate court with regard to hiring.

Under these circumstances, we doubt whether the questions presented by this case reasonably encompass a challenge to the court of appeals finding that there were no preferences in hiring. Since certiorari was granted to decide legal issues presented by respondents' promotional practices, no reason appears to depart from the usual rule that only "questions set forth in the petition or fairly included therein will be considered by the Court." Rule 21.1 (a).

Moreover, none of the petitioners has standing to challenge the respondents' hiring practices. The individual plaintiffs are both already

employed by the Department;[7] neither has been denied a promotion or been otherwise personally injured by the challenged policies (R.T. 921), and neither has alleged the type of harm that would have brought him within Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). The California Correctional Officers Association ("CCOA") is an organization of Department employees, all of whom have already been hired.[8] The plaintiffs sought certification of this case as a class action, which might have obviated the standing problem, but certification was denied and no appeal was taken from that denial. Therefore, they are in essentially the same posture as the plaintiffs in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977). That is, as persons who have not been injured in any way by any of the Department of Correction's employment policies, they may not represent persons who claim such injury. CCOA says it is injured by the Department's practices because CCOA is "an organi-

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7/ First Amended Complaint, p. 2; C.T. 64.

8/ First Amended Complaint, p. 3; C.T. 65.

zation actively opposed to racism and sexism".[9/] But this Court has clearly held that such allegations do not establish an interest sufficient to give standing. Sierra Club v. Morton, 405 U.S. 727, 734-740 (1972).

The California court of appeals expressed serious reservations about the petitioners' standing to maintain this action. Petition, A-23. Even if, however, the interest of the petitioners was sufficient to provide them with standing before a California court, this Court can only exercise jurisdiction over a dispute which meets the requirements of Article III of the Constitution. Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., in chambers). Any dispute about the respondents' hiring practices does not meet those requirements.

9/ First Amended Complaint, p. 11; C.T. 73.

B. Promotions

Ascertaining the nature of the Department's promotional process is complicated by the size and nature of that agency. Unlike the admissions decisions in Regents of the University of California v. Bakke, supra, these decisions are not made by a single individual or group acting on an agreed upon and mechanically applied rule. Most promotions in the Department of Corrections are made by individual supervisors in 12 institutions, four parole regions, and a central headquarters. While most promotions are made under this decentralized system, the promotions of the highest officials in each institution and region are made by the Director of the Department, in light of, but not necessarily following, the recommendations of the supervisors who are immediately concerned (R.T. 306-08). Several hundred positions around the state are apparently filled in this manner.

Affirmative action within the Department did not begin with the 1974 affirmative action plan, and that plan has not remained unchanged. Affirmative efforts to hire and promote women and minorities commenced in 1968 or 1969 at the

direction of then Director R.K. Procunier.[10/] Although minority employment in the Department of Corrections had remained at about 9% from 1963 through 1968, after 1968 it rose steadily at a rate of about 175 employees a year, reaching 19.8% of the work force in 1973.[11/] The actions initiated by Procunier, however, were never set out in a formal, written plan. The original written plan at issue in this case was issued on July 1, 1974 (Exhibit G, p.48). That plan was subsequently revised on April 1, 1975, and on April 1, 1979.[12/] The adoption of this written plan did not increase the ratio at which minority employment had risen at the Department: minorities rose from 9% to 19.8% in the 5 years prior to 1973, an average of 2.2% a year, and from 19.8% to 27.6% in the 6 years since 1973,[13/] an average of only 1.3% a year.

10/ Exhibit Q, p.1; C.T. 702-711, Declaration of R.K. Procunier, pp. 1-10.

11/ C.T. 983-995, Exhibits A-C to Declaration of Mary Van Schaik.

12/ A copy of the 1979 plan has been lodged with the clerk.

13/ See id., table following p. 32.

The critical factual issue is what steps the Department of Corrections is taking to bring about the increase of minorities and women in various positions within the system. The record contains two documents apparently widely distributed within the Department which set forth the official policies and required practices of the Department -- the Affirmative Action Plan (Exhibit G) and portions of a training manual (Exhibit 34). Petitioners have no objections to the provisions of these documents, which call for a policy of equal employment opportunities, the establishment of committees to identify and resolve problems of discrimination, mechanisms to recruit and train minorities and women, periodic reports of personnel actions, etc.

The plan also establishes "goals", or desired levels of minority and female employment (Exhibit G, pp. 11-13), but does not direct Department officials to take any particular steps to realize those goals other than the apparently unobjectionable measures described above.

In addition to the specific steps required by the written Plan, it is clear from the record that there was a practice, both authorized (R.T. 382) and personally implemented (R.T. 289 et seq., 373)

by the Director, of considering under certain circumstances, and to a limited degree, the race or sex of an individual seeking a promotion.

Race or sex was only taken into account if two specific circumstances were present. First, the minority or female applicant had to be as qualified as[14/] or "reasonably equally qualified" to the highest ranking white or male applicant.[15/] If one applicant was significantly better qualified than the others, he or she was given the promotion regardless of race or sex.[16/] Second,

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14/ R.T. 195, 197, 201, 215, 333, 454, 592, 600.

15/ R.T. 183, 185, 203, 204, 289, 304-6, 312, 374,381. One witness used both phrases. Compare R.T. 183-5 with R.T. 195-7.

16/ R.T. 200, 201, 209, 210, 312, 558, 697. Petitioners quote at length from the deposition of Ms. Roby-Stevens, Assistant Director for Women's Affairs, where she stated that a female might be appointed though "substantially" less qualified than a male applicant. R.T. 113. At trial, however, she insisted that she was mistaken, and had misunderstood the Director's policy. R.T. 183, 188, 194-195, 201, 203-204, 208-210. It is clear from the record that the Director, not Ms. Roby-Stevens, actually made the decisions regarding promotions. R.T. 360. The Director made clear that race and sex would not matter if there was a substantial difference in qualifications. R.T. 312.

there had to be an operational need for a person of a particular race or sex to occupy a specific job at a particular institution.[17] Because both the comparative abilities of applicants and the operational needs of particular institutions varied widely, so did the promotion rates.[18]

17/ R.T. 196 (relevance of race or sex depends on "the needs of the department"), 215 (Mexican-American applicant who spoke Spanish seeking a position at an institution with "large numbers of Latinos and Mexican-Americans"), 227 (black applicant for a position at "an institution with 60% black population and hardly any blacks at all on the staff"), 309 (importance of applicant's race depends on "the racial composition of the work force at the particular institution that had a vacancy"), 333 (preference for Latino or Chicano applicant only if "there was a need ... at the particular institution"), 373 (race a factor for "a job in the Department area where we need minorities"), 374 (choice among equally-qualified white, black, and Mexican-American applicants would "depend on where we are going to place the individual"). See also R.T. 376-77, 383, 488, 605, 670, 671.

18/ For example, in the first quarter of 1976, minority men received 18% of the promotions at penal institutions, 42% of the promotions among parole officers, and 0% of the promotions at the central office. Exhibit K, "CDC Promotions."

At times this practice was paraphrased by stating that being a woman or member of a minority group might add to one's qualifications for a particular job, though only by enough to affect the outcome in a close case.[19/] Department officials were sensitive to the possibility that the ability of a black guard to deal effectively with black inmates varied from applicant to applicant.[20/] They also were willing to recognize, and regard as a special qualification, a white applicant's particular ability to work with minority inmates (R.T. 453).

The petitioners maintain that this practice violated both the Constitution and federal law, and the state trial court so held. Whether that practice is indeed unlawful constitutes the central issue in this case. Petitioners also assert that over and above this practice, the Department of Corrections had a policy of setting aside specific positions for minority or women applicants only. In our view of the law, the

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19/ R.T. 383, 667-68, 672.

20/ R.T. 314. See also id. at 453 (not all Chicanos are bilingual), 387, 597.

the existence of such an additional practice would not be of controlling significance. We recognize, however, that under the standards announced by some members of the Court, such a practice might raise other and more difficult issues. Accordingly, we have reviewed the record to ascertain whether it supports petitioners' assertion that certain jobs were reserved for minorities or women. We conclude that it does not.

The record reveals two instances in which officials at particular prisons asked state officials to certify that four particular openings required a female employee (Exhibits 24, 25). This occurred pursuant to a practice which long predated the affirmative action activities (R.T. 70-71, 258) under which particular jobs could be so limited to men or women. Such certifications required the express approval of the State Personnel Board (R.T. 698), and Department of Corrections officials testified that the Department sought to minimize the use of such restrictive certifications (id.) The record also contains a request that a particular position be certified as "bilingual" (Exhibit 8), although it is not clear who could grant this sort of certification.

These certifications, had they all been granted, would have affected only 5 of the more than 8,000 positions within the Department of Corrections. In fact, however, there is no evidence that any of the requested certifications were ever issued. Moreover, petitioners have expressly disavowed any opposition to "female only" or "male only" certifications at institutions with female and male inmates respectively,[21/] and have not indicated opposition in principle to a requirement that a particular position be filled by a Spanish-speaking officer, so long as Spanish-speaking Anglos were also considered. The mere fact that in the past a handful of certifications were requested is insufficient to establish that there was an affirmative action policy of reserving particular jobs for women or minorities.

There were, as well, three isolated instances in which job announcements stated that particular

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21/ One of CCOA's officials testified, "[W]e find significant justification in a female sent to work at CIW in a women's dormitory or in a position where one would necessarily have to supervise women's activity in the shower, lavatory, things of that nature." R.T. 71; see also Plaintiffs' Post Trial Brief, p. 41; C.T. 364.

openings were limited to minorities or women.[22] The record makes clear, however, that these incidents were not within the scope of the Affirmative Action Plan, and that Departmental authorities took effective action to prevent their recurrence. Two of these annoncements were issued at about the same time by a single personnel official at one prison. In response to a complaint about one of these announcements, the Department stated that future announcements would not be so restricted;[23] the personnel officer involved was admonished not to do so again, and did not.[24] A second official at a different institution testified that a restriction in an announcement she had issued was a

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22/ Exhibits 11,12,13. The record also contains such an announcement from the Board of Corrections, Exhibit 6. The Board, however, is not part of the Department of Corrections. R.T. 83.

23/ Exhibit 11. At trial, petitioners maintained that the particular announcement had reflected Departmental policy, but acknowledged that in response to the complaint, the Department decided to "change its position". R.T. 97. Any such change in position occurred in February, 1975, 10 months before this action commenced.

24/ R.T. 100; see Exhibit 13.

mistake.[25] These three incidents involved two unrelated individuals, acting from no common plan or design, at two different institutions. They occurred within the first five months of the issuance of the Affirmative Action Plan and, if indeed causally related to that plan, were promptly recognized as not being authorized by it. The last of these incidents occurred 11 months before the complaint in this action was filed. Far from proving that the Department had a policy of reserving particular positions for women or minorities, these events indicate that the contrary was the case.

Petitioners also called as witnesses individuals who claimed that they had been denied promotions because they were white males and alleged in some instances that positions were being reserved for minorities or women (R.T. 6-64, 117-57). Their testimony was specifically rebutted by a series of defense witnesses[26]; in at least two instances the jobs being sought by

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25/ R.T. 99; see Exhibit 12.

26/ R.T. 432-80 (regarding the named plaintiffs and complaining witness from Susanville), 503-08 (regarding Tommy Simpson), 530-35, 539-42, 577-78 (regarding George Thomas).

these complaining witnesses had in fact been filled by white males.[27] The trial judge concluded that none of these individuals had been denied the positions in question because of their race or sex (R.T. 921), and no appeal was taken from that decision. One other witness, Jack Mayo, testified that he believed he was required to interview only minorities for positions within his unit, and that he had done so.[28] Mayo's supervisors, however, made clear that they regarded Mayo's view of his responsibilities as mistaken, and that when they learned of it, they instructed him to interview all applicants, regardless of race or sex.[29] Counsel for petitioners conceded at trial that Mayo had been directed to stop telling whites that they would not be considered (R.T. 811).

27/ R.T. 494, 507. During the second quarter of 1976 all seven promotions at Susanville were awarded to whites. Exhibit 32.

28/ R.T. 709-733; Exhibit M.

29/ R.T. 773, 776, 777, 798-9, 800-01. See also R.T. 684-87. Prior to this incident, all of the 15 or 16 employees who worked for Mayo were white, R.T. 774, and Mayo's superiors believed that he had intentionally discriminated against minorities. R.T. 774,798.

Although the written Affirmative Action Plan sets certain goals for minority and female employment, 36% minorities and 38% women, these goals appear to be of little operational importance. There clearly is not a numerical quota; no fixed portion of promotions is set aside for either women or minorities. Petition, A-16. Although, in a close case, Departmental officials may consider whether there is an operational need for a member of a minority group or woman in a particular position, their testimony does not indicate that this assessment of these needs follows from any mechanical calculation. See n. 17, supra. The primary significance of these goals is that they provide a method by which personnel officials in Sacramento identify institutions where there may be problems.30/ Although the plan hoped for achievement of these goals by 1979, the Department obviously did not believe that deadline had to be met, regardless of how drastic the necessary measures; as early as January, 1975, correctional officials concluded that the goals would in fact not be met until at

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30/ Exhibit K, "Quarterly Management Review."

least 1983,[31/] and the record reveals no change in practices occasioned by this realization. The plan was revised and extended an additional five years in 1979.

In sum, while the record demonstrates that Departmental officials do at times consider the race or sex of applicants for promotion, this occurs as a rule only when there are no significant differences in their qualifications, and when the race or sex of an applicant would in fact affect his or her ability to perform the job at issue. The Department did not set aside specific jobs for women or minorities.

II. RESPONDENTS' PRACTICES ARE NECESSARY TO MAINTAIN SECURITY AT CALIFORNIA'S CORRECTIONAL INSTITUTIONS.

The affirmative action cases previously before this Court have involved public policies in a variety of important areas -- education,

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31/ See Exhibit K, "California Department of Corrections, Projection for Attainment of CDC Affirmative Action Goals."

employment, and the construction of public works. This case, however, concerns the most fundamental of all governmental functions, the preservation of order and the protection of individuals from criminal violence. In the allocation of jobs or college admissions the consequences of error are important but rarely catastrophic. Under such circumstances some members of this Court have held it is appropriate to scrutinize official decisions predicated on operational needs and the availability of alternative solutions. In this case the California Department of Corrections concluded that certain affirmative action policies were essential to the security of its correctional institutions. Any judicial decision interfering with those policies could have severe consequences.

The problems which led to the adoption of the Department's affirmative action policies were grave. There was "more violence and killing in California's prisons than in any other state system. In the four years prior to 1974, 400 inmates and staff ha[d] been wounded, and almost 100 killed."[32/] That homicide rate represented a

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32/ Serrill, "Profile/California", 1 Corrections Magazine, No. 1, (Sept. 1974), p. 3.

400% increase over the rate prevalent in the mid-sixties (C.T. 746). In 1970-71 alone nine correctional officers and twenty-eight inmates were killed (C.T. 703) compared to only four employee homicides in the previous 17 years.[33/] In 1975, in San Quentin alone, there were five murders (R.T. 489).

An increasing number of these violent incidents were racial in nature. A State Task Force to Study Violence in Prisons reported that between 1963 and 1964 the proportion of such incidents caused by racial hostilities jumped from 7.1% to 15.3% (C.T. 750). By 1973 about 29% of all stabbings were racial in origin.[34/] The record described racially-based assaults or murders at correctional institutions at San Quentin (C.T. 703), San Luis Obispo (id.), Soledad (C.T. 504; R.T. 559), Jamestown (C.T. 494-95, 560), and Folsom (C.T. 703). The racial atmosphere in many institutions was explosive.

33/ Procunier, "The Dilemma of Prisons", National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 19.

34/ Exhibit C, Appendix C, Chart No. 7.

> Most inmates in prisons such as Soledad and San Quentin [were] prejudiced against prisoners of other races....Many of the correctional officers exhibited little sympathy or understanding towards minority inmates and frequently made racial slurs and openly told offensive ethnic jokes (C.T. 501).

In many such institutions the inmates were organized into racial gangs, particularly the Aryan Brotherhood, the Black Guerilla Family, the Mexican Mafia and Nuestra Familia.[35/] In at least six facilities inmates of one race refused to associate with inmates of other races, segregating themselves in dining halls, movies, the recreation yard, or other locations.[36/] At one prison the mere "sight of a white officer stopping a Black inmate would often cause other Blacks to congregate in the vicinity, and would thus create

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35/ R.T. 340, 476, 559-60, 642; C.T. 561.

36/ C.T. 789; R.T. 899 ("If a new guy comes into the penitentiary, see, and him and a white guy, they may have been friends on the streets, and like if they start eating together, well, then peer group will put pressure on them to make them stop. And I've seen this happen many times, you know").

a volatile atmosphere".[37]

This explosive and at times lethal situation had many causes, but one of them was clearly racial discrimination on the part of the virtually all-white correctional staff. Following a race riot at San Quentin, a correctional official there reported that the riot arose out of a pattern of discrimination and segregation.[38] Racial slurs against minority inmates were common;[39] they were openly referred to by the white guards as "niggers", "boy", "buckwheat" and "coon".[40] Minority inmates were relegated to menial jobs or those with limited potential outside the prison, and only white inmates were hired as clerks.[41] Discrimination existed in

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37/ C.T. 541.

38/ C.T. 827 ("In almost every area of prison life, there is one standard for white inmates and another for Negro inmates"). See also C.T. 704-05; Serrill, "Profile/California", 1 Corrections Magazine, No. 1, (Sept. 1974), pp. 3, 31.

39/ C.T. 785, 938.

40/ C.T. 827, 864, 873, 926, 930.

41/ C.T. 705, 776, 852, 860.

both vocational education[42/] and the allocation of desirable cells.[43/] Racism by white correctional officers against minority officers was virulent and contributed to racial tension. Slurs against minority staff[44/] in the presence of white inmates encouraged white inmates to adopt the same attitudes (C.T. 927). Minority inmates were also aware of the manner in which minority officers were treated and saw it as a reflection of the discrimination in the prison system. C.T. 931. Not surprisingly, the systemic discrimination against minority inmates and staff reinforced racial hostilities. The Marin County Grand Jury, after investigating the San Quentin riot, reported that

> Racist attitudes on the part of custodial personnel pervade the department so as to become the rule and not the exception. In the tinderbox environment of San Quentin, racial epithets, especially by prison personnel, are a sure cause of tension, irritability, and violence. There is no doubt in the mind of this Grand Jury that virtual institutionalization of overt racism has been the direct cause of countless serious injuries to both prisoners and staff alike ... (C.T. 920).

42/ C.T. 705, 778, 852.

43/ C.T. 705, 970.

44/ C.T. 864, 873, 926, 930.

A task force established to investigate the San Quentin riot urged the Department to take steps to increase the number of minority group employees (C.T. 704). The initial affirmative action policies were adopted in response to this proposal (id.). In May, 1974, a subsequent Task Force to Study Violence urged renewed efforts to increase minority employment, arguing that increasing the proportions of Black and Chicano employees will relieve although not solve the problems.[45/] Acting in part in reliance on the latter report the Director of the Department issued the written Affirmative Action Plan which is under attack in this case (R.T. 325).

Department officials have concluded that the presence of minority employees is essential in a variety of ways to the maintenance of security. The most dangerous role for which those employees are needed is to help control and prevent race riots and other racial incidents among the inmates or between inmates and guards.[46/] The importance

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45/ The Task Force to Study Violence, Report and Recommendations, (May, 1974), p. 1, p. 20.

46/ With respect to another law enforcement branch, the police, the presence of black of-

of minority guards was graphically illustrated by the testimony of a black former guard who averted bloodshed in the wake of a near riot in the Big Yard at San Quentin in 1971. After black and white inmates were physically separated, the white Yard Lieutenant directed the black inmates to return to their cells. They refused to do so, and defied the white officer to come closer to them; he refused to do so, and called instead for guns and tear gas. At that point, a black guard was called in and, by merely reasoning with the black inmates, was able to end the confrontation. He testified:

> A. There was no violence then, no... But I am saying by me being black, I had a little -- I had that extra going for me because they wouldn't arbitrarily attack me .... If that other [white] Lieutenant would have gone up there, I'm quite sure they would

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46/ continued

ficers, particularly supervisors, has been considered important in controlling and easing tensions during potential racial confrontations. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967), pp. 1, 172; Report of the National Advisory Commission on Civil Disorders (1968) pp. 1, 315.

have attacked him. 47/

The record contains other examples of how minority guards were able to avert racial violence,48/ and how the lack of black officers hampered the Department's ability to deal effectively with racial disturbances (C.T. 494-95).

However, the importance of minority officers is not limited to extreme situations. Under normal circumstances guards are constantly at risk. With rare exceptions, guards do not carry firearms,49/ and frequently they are surrounded by hundreds of inmates, many of whom "have demonstrated a capacity for violence". Pell v. Procunier, 417 U.S. 817, 826 (1974). There is a danger, as one former guard testified, that "[o]ut of frustration, your color gets you killed, you know, just for no reason." (R.T. 896).

Under these "ordinary" circumstances corrections officials maintain control of their institutions, not by force of arms or by intimidation

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47/ R.T. 897. This white Lieutenant ordinarily had excellent relations with black inmates. R.T. 900-901.

48/ R.T. 551, 663; C.T. 503-04, 525.

49/ R.T. 336, 623.

and threats, but through an effective and cooperative relationship with the inmates. "[T]he operation of a prison facility depends upon the ability of the staff to interact with the inmates and to come to some common agreement as to how the activity should be conducted" (R.T. 621). The most important qualification a correction officer must have is the "ability to effectively communicate. Not only to be able to perceive what is going around him or her in the institution, but to be able to diffuse potentially dangerous or tense situations."50/

The California Department of Corrections concluded that minority officers were likely to communicate more effectively with minority inmates. This view was shared by the wardens of Folsom and San Quentin prisons (R.T. 445; C.T. 500-02), the supervisors of institutions at Soledad, Deuel and Jamestown (C.T. 509-10, 541-42, 494-96), the Director and Personnel Director of the Department (R.T. 322-23, 324, 343-44, 676), and other high ranking state corrections officials (R.T. 550, 591, 596-97,

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50/ R.T. 676; see R.T. 336, 624, C.T. 496.

563). As the Director explained:

> I do believe, on the basis of my experience in this business, that generally speaking when you're dealing with groups of black inmates in a prison, generally speaking, the black correctional officer would generally have a better chance of being accepted and of dealing with and relating to those black inmates than any other ethnic group (R.T. 343-44).

Their shared history as victims of societal discrimination affords a potential bond between Black or Mexican-American inmates and guards that could prove critical at times of strife (C.T. 502). State officials also recognized that a white officer might be literally unable to understand Mexican-American inmates, many of whom speak only Spanish;[51/] similar concerns were expressed about the use of ghetto dialect on the part of black inmates (R.T. 654-55, 895, 904).

Correctional officials also found that minority officers were likely to be essential in conducting investigations of incidents or criminal conduct within a facility when one or more of the

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51/ R.T. 321, 479, 625, 662; C.T. 526.

witnesses were non-white.[52/] The role of minority supervisors in shaping institutional policies had proved critical to avoiding decisions likely to provoke racial difficulties, and to ascertaining steps tending to improve the racial atmosphere (C.T. 504-05, 510-13, R.T. 627).

The necessity for minority officers reaches to all levels of the prisons. The presence of minority supervisors prevents the implementation of policies which inflame racial antagonisms (C.T. 504), and affects decisions which affirmatively improve racial understandings and the feeling among minority inmates that the administration has abandoned its discriminatory practices and has begun to treat all inmates fairly (e.g., C.T. 510-11). Having minorities in supervisory roles also insures the elimination of specific discriminatory practices, as in inmate work assignments (C.T. 526). As the Association of State Correctional Administrators has recognized,

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52/ R.T. 562; C.T. 502 ("[s]hould a black and white inmate be involved in a racial assault, it is extraordinarily helpful for the white inmates to be interviewed by a white staff member and a black by a black "), 509.

there is a "clear need to increase the number of minority personnel at every level of corrections ..." Uniform Correctional Policies and Procedures (1972), pp. 22-24.[53/]

To characterize the Department's Affirmative Action Plan as pandering to inmates' "customer preference"--as in cases in which airlines argued that their predominantly male passengers preferred female flight attendents--trivializes a serious problem of institutional and individual security to the point of absurdity. First of all, unlike the male airline passenger's predilictions, minority inmates' distrust of white officers is grounded in a very real history of overt racist conduct. In the context of a similar argument

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53/ Accord, National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973) p. 1, pp. 474, 599; Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972) p. 1, pp. 23-24; National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8), 1971), p. 19, pp. 50, 85, 91, 92; Final Report of Joint Commission on Correctional Manpower and Training, A Time To Act, (October 1969), p. 1, p. 14; Skoler and Loewenstein, Minorities in Correction, Nondiscrimination, Equal Opportunity and Legal Issues, 20 Crime and Delinquency, N. 4, (Oct. 1974), p. 339, p. 340.

made by white police officers against the Detroit Police Department's affirmative action plan, Judge Damon Keith noted:

> The City's operational needs defense cannot be separated from the historical context in which it arose. In an ideal world there is no question that the operational needs defense would be untenable. However, we do not live in an ideal world, and the history of race relations in the City of Detroit is far from ideal.

Baker v. City of Detroit, 483 F. Supp. 933, 996 (E.D. Mich. 1979).

Secondly, the experience in California's prisons and elsewhere has been that the presence of more minority correctional officers does in fact facilitate communication and cooperation between inmates and staff, does in fact reduce racial tensions, and does in fact avert violence and assaults. "[I]n the current environment, where prison disruption remains a serious concern to administrators," this Court has not "ignore[d] the desire and effort of many states . . . to avoid situations that may trigger deep emotions" and violence. Wolff v. McDonnell, supra, 418 U.S. at 568.

Finally, the affirmative action program was not instituted because black inmates only like black guards (R.T. 338-39). The trial court itself recognized that minority and female employees were indeed needed in certain positions, and approved assignments on the basis of race and sex. Petition, F-6 to F-7.

To a substantial degree, the purposes served by minority employees require that they be at all levels of the Department, not merely in the lowest ranking positions. The Law Enforcement Assistance Administration initially urged as a guideline that the proportion of minority employees be 70% of the proportion of minority inmates. Exhibit G. In 1976, after LEAA withdrew the use of the proportion of minority inmates as a standard, California officials, drawing on four years of experience under the Affirmative Action Plan, decided to continue this guideline. Petitioners did not raise as an issue or seek to prove at trial that the number of minority and female employees was already sufficient to meet the Department's operational needs, or that the 70% guideline was too high; they urged instead simply that there were no such operational needs. Their claim in

this Court that there were ample minority employees when the plan was adopted is clearly not supported by the record.[54/]

These judgments on the part of California officials, and the affirmative action policies adopted by the California Department of Corrections, were not unique. Racial violence in prisons is a nationwide problem;[55/] and correctional administrators and experts have looked closely at the interaction between staff and inmates as the key in diffusing the tension.[56/] The New York

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54/ For example, among 25 top administrators, 31 teacher supervisors, 61 psychiatrists, 37 chaplains and 33 Correction Counsellor III's, there was not a single Mexican-American. There was only one Mexican American among 65 academic teachers, among 33 Correction Counsellor II's, among 36 psychiatrists, and among 36 deputy or associate administrators. Exhibit G, p. 34.

55/ Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972) p. 1, pp. 22-24; National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, (1973), p 1, p. 465.

56/ Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972), p. 1, pp. 22-24; National

commission investigating the Attica tragedy found its roots in the absence of minority guards and in racial discrimination on the part of white corrections officers.[57] Correctional administrators,[58]

56/ continued

Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, (1973) p. 1, pp. 363, 365; National Conference on Corrections, Williamsburg, Virginia (Dec. 5-8, 1971), p. 50; Attica, The Official Report of the New York State Commission on Attica (hereinafter referred to as McKay Commission Report), preface XVIII, pp. 3, 4, 79-82, 112, 113.

57/ McKay Commission Report, p. 1, pp. 2-4, 38-40, 80, (Bantam Ed., 1972).

58/ Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972), p. 1, pp. 23-24; Procunier, "The Dilemma of Prisons", National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 19, p. 20; Manpower for Corrections, Group Discussion Papers, Workshop II, National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 83 (McLaughlin), 91 (Breed), 92 (Luger), 93 (Wallace), 93-95 (Nagel), 96-97 (Sanfilippo), 103 (Oswald); The Task Force to Study Violence, Report and Recommendations, (May 1974), p. 1., p. 20.

experts in the field,[59] Congress,[60] and a

59/ Higginbotham, J., "From the Outside Looking In: Is Yesterday's Racism Relevant to Today's Corrections?", Outside Looking In, A Series of Monographs Assessing the Effectiveness of Corrections, Law Enforcement Assistance Administration, U.S. Department of Justice, (April 1970); Skoler and Loewenstein, Minorities in Correction, Nondiscrimination, Equal Opportunity and Legal Issues, 20 Crime and Delinquency, No. 4, (Oct. 1974), p. 339, 340; Mitchell, "New Doors, Not Old Walls," National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 5, p. 8; McGee, "Manpower For Corrections, Summary of Workshop II Reports," National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p.49, p. 50; Kutak, "New Directions in Corrections, Summary of Workshop III Reports," National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 52, p. 53; Manpower for Corrections, Group Discussion Papers, Workshop II, National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971) p. 83, pp. 83, 84 (Moeller), 85 (Conrad).

60/ American Prisons In Turmoil, Hearings before the House Select Committee on Crime, 92nd Cong., 1st and 2nd Sess., (1971 and 1972), p. 1, pp. 8, 21, 22, 40, 41, 58, 59, 80, 81, 140-43, 148, 149, 154-57, 168, 169, 224, 227, 318, 319; Pepper, Prisons In Turmoil, 36 Federal Probation, No. 4, (Dec. 1972), p. 3, p. 4.

series of national commissions[61/] have consistently urged that the number of minority correctional employees be sharply increased. The Report on Corrections of the National Advisory Commission on Criminal Justice and Standards recommended that correctional officials "take immediate, affirmative action to recruit and employ minority group individuals."[62/] The Attorney General reported in 1971 that the Federal Bureau of Prisons had a goal of one-third minority employment in all new hiring and strongly supported such efforts, arguing they "would greatly increase the effectiveness of counseling and guidance ... [and]

61/ National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, (1973), p. 1, p. 363, 435, 465, 466, 471, 474, 475, 599; Joint Commission on Correctional Manpower and Training, Corrections, 1968, A Climate For Change, (1968), p. 1, p. 28; Final Report of Joint Commission on Correctional Manpower and Training, A Time To Act, (Oct. 1969), p. 1, p. 76.

62/ National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973), p. 1, p. 474; see also, id. at pp. 363, 435, 465-66, 471, 474-75, 599.

genuinely benefit the corrections process."[63/]

The Fourteenth Amendment does not prevent a state or local government from implementing race-conscious measures to meet a sufficiently important or compelling government interest. Regents of the University of California v. Bakke, supra, 438 U.S. at 362-69 (Opinion of Brennan, White, Marshall, and Blackmun, J J.); id at 310-15 (Opinion of Powell, J.). In Bakke, Justices Brennan, White, Marshall, and Blackmun held that because of the clear and substantial discrimination against minorities in education there was "no question" that the state medical school's affirmative action admissions program was constitutional. Id. at 369. Justice Powell noted that a state's interest in facilitating the health care of its citizens or in attaining a diverse student body in its educational institutions would be sufficiently compelling to support the use of racial classifications. Id. at 310-12. The state's need to maintain security in its prisons is at least as compelling as the governmental interests which were at stake in Bakke.

63/ National Conference on Corrections, Williamsburg, Virginia (Dec. 5-8, 1971), p. 5, p. 8.

In employment discrimination cases, courts have appropriately acknowledged the peculiar needs of governmental law enforcement agencies, as distinguished from private employers, to have minority employees in order to perform their essential functions. Courts have repeatedly determined that, where there is a disproportionately low number of minority police officers compared to the representation of minorities in the population, an increase in the number of minority officers will substantially improve the quality of law enforcement; and accordingly, the courts have taken this factor into account in determining an appropriate remedial order, see, e.g., Bridgeport Guardians Inc v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1341 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); Arnold v. Ballard, 390 F. Supp. 723, 736 (N.D. Ohio 1975), aff'd, 12 FEP Cases 1616 (6th Cir. 1976) vac. and rem. on other grounds, 16 FEP Cases 396 (6th Cir. 1976). In approving an affirmative action remedy for a police department, the Second Circuit emphasized that

> this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement.

Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra at 1341. Accord, NAACP v. Allen, supra at 621; Arnold v. Ballard, supra, 390 F. Supp. at 736; Baker v. City of Detroit, supra, 488 F. Supp. at 966-67.

The need to maintain order and security in prisons is essential to the state's job of providing adequate correctional institutions. The record in this case as well as the findings of experts throughout the nation, show that minority correctional officers are an essential component in the maintenance of order. Once, as here, the substantial or compelling government interest is established, the issue becomes whether the affirmative action program at issue is designed to further that interest,[64/] and whether the remedy

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64/ Fullilove, supra, 65 L.Ed.2d at 925-32 (Burger, C.J., joined by White and Powell, JJ.), 937, 945 (Powell, J.); 951-52 (Marshall, J., joined by Brennan and Blackmun, JJ.); Bakke, supra, 438 U.S at 275-76, 317-18 (Powell, J.); 359 (Brennan, White, Marshall, and Blackmun, JJ.).

is tailored "to fit the nature and extent of the ... violation." Dayton Board of Education v. Brinkman, 433 U.S. 406, 419-420 (1977), quoting Milliken v. Bradley, 418 U.S. 717, 738 (1974), cited with approval in Fullilove v. Klutznick, supra, 65 L.Ed.2d at 927.

From the standpoint of operational need, the purpose of the Affirmative Action Plan is not to make victims of past employment discrimination whole. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Rather, the purpose is to undo the debilitating and dangerous effects that past discrimination has had on the ability of the state to maintain order in its prisons. The compelling need to have minority guards visible and available throughout an institution to quell racial tensions and avert violence is directly related to the presence of minority inmates in the prison population. It has little, if any, relationship to the number of minorities in the relevant labor market. In order to tailor a remedy to meet that need, the percentage or number of minority inmates in the prisons is the ideal framework from which to assess the affirma-

tive action plan.[65/]

Courts have an obligation to assess the reasonableness of the parameters of an affirmative action plan. However, in the context of law enforcement agencies, and in prison administration in particular, the precise manner in which the goals of the plan are related to the prison population encompasses complex "considerations [which] are peculiarly within the province and professional expertise of correctional officials." Pell v. Procunier, 417 U.S. 817, 827, (1974) cited in Bell v. Wolfish, 441 U.S. 520, 540, n.23 (1979); See Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977); Procunier v. Martinez, 416 U.S. 396 (1974), see also, Lee v. Washington, 390 U.S at 333, 334 (1968) (Black, Harlan,

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65/ Although there is evidence to support the operational need for women correctional officers (R.T. 445, 485, 555, 583, 594, 611-17; C.T. 505, 511), this Court need not decide whether that need justifies an affirmative action plan for women. The plan's goal for women is tied to the labor force (unlike the goal for minorities, which is tied to the inmate population), and is justified as a means to overcome prior intentional discrimination against women in employment. See Point III, infra.

Stewart, JJ., concurring). The goal in respondents' plan, 70% of the minority inmate population, was one recognized as appropriate by LEAA and explicitly or implicitly approved of by scores of prison authorities.[66/] And as set forth in Point I, supra, the actual practices of respondents were flexible and directly related to promoting qualified members of minority groups and females where they were needed. "Because [these] realities of running a penal institution are complex and difficult," this Court has "recognized the wide-ranging deference to be accorded the decisions of prison administrators." Jones v. North Carolina Prisoners' Union, 433 U.S. at 126.

66/ National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973), p. 1, p. 435; Skoler and Loewenstein, Minorities in Correction, Nondiscrimination, Equal Opportunity and Legal Issues, 20 Crime and Delinquency, No.4, (Oct. 1974), pp. 339, 340; American Prisons In Turmoil Hearings Before the House Select Committee on Crime, 92nd Cong., 1st and 2nd Sess., (1971 and 1972), supra; The Task Force To Study Violence, Report and Recommendations, (May 1974), p. 1, p. 20; McKay Commission Report, pp. 2, 3; McGee, "Manpower For Corrections Summary of Workshop II Reports, National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 49, p. 50.

Counsel for amicus has at times disagreed with this approach.[67/] Nevertheless, the deference historically accorded these governmental officials in the area of prison security should be no different in this context, for the operational reasons prompting the adoption of the Affirmative Action Plan are directly related to maintaining prison security and accordingly the deference that has been given in the past applies with equal force here.

III. RESPONDENTS' PRACTICES ARE JUSTIFIED AS A METHOD OF OVERCOMING THE EFFECTS OF PAST DISCRIMINATION.

Fullilove v. Klutznick, supra, and United Steelworkers of America v. Weber, supra, made clear that an employer can adopt race-conscious policies to redress the effects of past discrimination.[68/] Those holdings provide an alternative

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67/ See, e.g., Brief for Appellees Hillary, et al., Procunier v. Hillary, No. 73-754; Brief Amicus Curiae for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., Bell v. Wolfish, No. 77-1829.

68/ International human rights norms recognize the propriety of affirmative action. The International Convention on the Elimination of All Forms

basis for the affirmative action practices in this case.

As we noted in Point I, supra, affirmative action efforts originated in 1968 when Director Procunier learned that increased racial violence in the prison had its roots in discrimination by white officers. Procunier's investigation revealed that the paucity of minority officers was due to widespread and intentional discrimination against minorities in hiring and promotion (C.T. 704-709). He stated that both the policies initiated in 1968 and the written 1974 plan were "designed in part to bring these discriminatory

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68/ continued

of Racial Discrimination, adopted Dec. 21, 1965, G.A. Res, 2106A, 20 U.N. GAOR, Supp. (No. 14) 47, U.N. Doc. A/1604 (1965), signed by the U.S. on Sept. 28, 1966 [Executive C. 95-2], transmitted to Senate, Feb. 23, 1978, cited in 4 Treaties Pertaining to Human Rights, Message from the Pres. to the Senate, 95th Cong., 2nd Sess., U.S. Gov't Printing Office 1978, provides (Article 1) that: "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups ... shall not be deemed racial discrimination." There is a similar provision for women. Convention on the Elimination of Discrimination Against Women, opened for signature Dec. 18, 1979, U.N. Doc. A. RES/34/180 (1979), signed by the U.S. July 11, 1980.

practices to an end and to undo the effect of these practices over so many years" (C.T. 710). The present Director, Enomoto, corroborated this at trial (see R.T. 338). An assistant director stated that the initiatives taken in 1968 were based on the recognition that "racism, overt and subtle, existed in the Department and to call it that, as opposed to some of the popular euphemisms, and then to try to deal with practical realities" (Exhibit Q, p. 1).

Despite petitioners' assertions to the contrary, counsel for respondents advanced prior discrimination against women and minorities as a justification for the plan, and the trial court made no findings either that the plan had not been adopted to remedy past discrimination or that respondents had not advanced past discrimination as a reason for adopting the plan.[69/]

Indeed, at trial, witnesses repeatedly testified as to the Department's history of discrimination against minorities and women (R.T. 212, 213, 327, 442-43, 871-72). Discrimination in

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69/ Compare Brief for Petitioners, p. 19 with Finding of Fact #13, Petition F-5.

the conduct of oral examinations was cited as a method of excluding minorities, along with testing (R.T. 371-372, 442-43, 824 et seq., 872-30). Until at least 1972 the Department set higher educational requirements for women officers than for men in the same positions, and refused to permit women to hold most positions in male institutions. (R.T. 211, 327, 485, 529; see R.T. 605). On three separate occasions the trial judge indicated that he was persuaded that there had been such discrimination, and he even urged the plaintiffs to stipulate that it had occurred. (R.T. 344, 379-80, 426-27).

Other evidence demonstrated the virulent nature of the Department's past discriminatory practices. Director Procunier explained that the Department had deliberately refused to recruit through minority media, had falsified physical examination records of minorities,[70/] had denied minorities applications and information about upcoming examinations, had intentionally used a

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70/ For example, one black female applicant was told blacks had "bad blood", which was "hereditary syphillis". She submitted to a spinal tap and other tests to show she had no syphilltic traits. C.T. 836.

written test which it had known for years was "discriminatory and culturally biased", had given minorities unwarranted low performance evaluations in order to deny them promotions, and generally had given minorities "a run-around to discourage their applying for employment in the Department" (C.T. 702-709). Procunier's statements were confirmed by correctional officials from facilities throughout the state.

The warden at Folsom participated in interview panels for job applicants where decisions were made not to hire otherwise qualified minority applicants on the ground that minorities were not acceptable in the predominantly white communities where certain prisons were located. C.T. 832. As late as 1974 through 1976, minority officers at Soledad, particularly blacks, received less favorable assignments, and were victims of racial slurs and other abuses (C.T 864, 873). As one white correctional officer admitted:

> Often the harassment was petty in nature; lunches would mysteriously disappear from lunch rooms or be found to contain urine. In other cases, the behavior ran to fundamental issues of effectiveness and prison security, as when white inmates were incited to harass Chicano and black officers (C.T. 873).

The workforce analysis on which the 1974 plan was based showed the extent to which the effects of past discrimination remained. Among security officials and correctional counselors, positions that account for the vast majority of jobs in the institutions, minorities were largely excluded from supervisory roles despite their presence at the lower level positions, as shown by the following table.

Minority Staff,
September, 1973

Correctional Counselors

	Black	Spanish-Surnamed
Correctional Counselor I	9.0%	5.4%
Correctional Counselor II	8.2%	1.4%
Correctional Counselor III	0%	0%

Guards

Correction Officer	11.1%	11.2%	
Correction Sergeant	5.0%	5.5%	
Lieutenant	1.1%	4.3%	
Supervisor, Captain	4.4%	6.4%	71/

71/ Source: Exhibit G, 34.

As of 1974, the proportions of Mexican-American and female employees in the Department were still only half their proportions in the state labor force (Exhibit G, 26-27).

As we demonstrated in Point II, supra, the Department's past discriminatory practices have not only victimized minority applicants and employees but have also contributed to the pervasive climate of racial tension and violence in the state's prisons. The state has a duty to remedy those consequences of its own discriminatory conduct. See, e.g., Milliken v. Bradley, 433 U.S. 267, 281 (1977); Louisiana v. United States, 380 U.S. 145, 154 (1965); Green v. County School Board, 391 U.S. 430, 438 (1968). Whatever rights inmates lose upon entering a prison, they do not relinquish the right to be protected against invidious discrimination on the basis of race under the Equal Protection Clause. Bell v. Wolfish, 441 U.S. 520, 545 (1979); Cruz v. Beto, 405 U.S. 319, 321 (1972); Lee v. Washington, 390 U.S. 333 (1968). Under these circumstances, continued affirmative action was clearly still warranted.

IV. THIS COURT SHOULD CONSIDER ALL EVIDENCE OFFERED IN THE TRIAL COURT.

The evidence in this case was offered in the trial court in three distinct phases. First, the trial itself began less than eight months after the filing of the complaint, and was completed on October 12, 1976. Second, in response to a motion for a preliminary injunction in February, 1977, respondents submitted affidavits of several correctional officials regarding the operational need for minority and female staff (C.T. 494-602). Third, respondents on April 7, 1977, filed a motion to augment the record, to which was annexed affidavits of more than two dozen correctional officials concerning past discrimination in hiring and promotion against minorities and women (C.T. 701-983). The trial court entered its Findings of Fact and Conclusions of Law on October 11, 1977, six months after respondents filed their motion to augment the record.

The trial court, prior to its final decision, denied the motion to augment the record, and petitioners appear to suggest that this Court should

therefore disregard the information contained therein (Brief for Petitioners, 15). The trial court rejected that motion on the ground that such evidence was irrelevant; it expressly rejected petitioners' request that it rule the motion untimely (R.T. 1432-33).

The California court of appeals did not find the proffered evidence irrelevant, but held that the trial court "did not abuse its discretion in denying the motion, which was made by afterthought and much too late "(Petition, A-23). Even had the evidence never been offered in the trial court, however, California law gives an appellate court discretion to consider any new evidence in a non-jury case.[72/] In the resolution of a case of constitutional magnitude, the power of this

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72/ California Code of Civil Procedure, § 909, provides:

> In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make findings of fact contrary to or in addition to those made by the trial court. Such findings may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the

Court is not limited by such exercises of discretion by the state courts below. See Williams v. Georgia, 349 U.S. 375, 382-83 (1955). At the least, this Court may exercise the same discretion in deciding whether to consider such evidence as could be exercised by a state appellate court.

The issues presented by this case are too important to permit a decision based on an incomplete picture of the history and harsh realities of the California prison system. Immediately at stake are practices which may affect the safety and the very lives of the thousands of inmates and correctional officers in California. Any deci-

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72/ continued

> purpose of making such findings of fact or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make such further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

sion on the merits of this case, no matter how carefully confined to the record described by the Court, will have profound effects on the ability of correctional administrators in other states to deal with the problems of racial violence. This Court has the power to, and amicus submits it is appropriate to, consider all evidence proffered by respondents in the trial court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the California Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court U.S.
FILED
SEP 12 1980
MICHAEL RODAK, JR. CLERK

No. 79-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN,
CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, *et al.*,
Respondents.

On a Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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Respondents.

On a Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council, with the consent of all parties,[1] respectfully submits this brief as Amicus Curiae, in support of petitioners, Wayne Minnick, *et al.*

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council ("EEAC") is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices.

Most of EEAC's members, moreover, have undertaken various types of affirmative action efforts either voluntarily or pursuant to the requirements of Executive Order No. 11246, 3 C.F.R. 169 (1965), *as amended and reprinted in* 42 U.S.C. § 2000e (1976). While they strongly agree that individual employers should have a wide latitude to undertake such efforts voluntarily (*cf. United Steelworkers of America* v. *Weber*, 443 U.S. 192 (1979)), they also are concerned that any governmentally adopted or compelled

affirmative action requirements should meet proper constitutional requirements which, of course, are stricter than those statutory standards governing purely private action. *Cf. Washington* v. *Davis*, 426 U.S. 229 (1976).[2]

Similarly, EEAC's members, as major employers of the nation's work force, have a vital interest in the promotion of sound statistical methodology used to ascertain work force availability and, where it exists, to identify and remedy employment discrimination. The equal employment obligations of a particular employer typically depend upon the qualifications required for particular jobs, the number of job openings, and the availability of qualified personnel in the relevant labor market. Because of these and other complex variables, a particular employer's work force often may legitimately fail to mirror theoretical minority and female availability statistics. Because of the increasing reliance upon statistical proof

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[2] Because of the difference in standards, it seems clear that employers may engage in voluntary affirmative action efforts beyond that which they may be *compelled* to undertake by government regulations. *Cf. United Steelworkers of America* v. *Weber*, 443 U.S. at 200 (approval of private race-conscious affirmative action plan did not involve state action, and thus did not implicate the Equal Protection Clause of the fourteenth amendment to the Constitution); *H. Earl Fullilove, et al.* v. *Klutznick, et al.*, 100 S. Ct. 2758, 2780 (Burger, C.J.) ("where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed.") This case thus involves directly the permissible constitutional limits of government action rather than the statutory authority to undertake private voluntary efforts of this type.

by litigants and by the courts, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977), it is imperative that statistical analyses be sound in their development and reliable in their application.

In sum, EEAC members have a direct interest in ascertaining the proper constitutional scope of government authority to fashion and to enforce preferential employment goals, and in establishing appropriate methodologies for determining the relevant market for minority and female availability when such examination is necessary.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court. Among such cases have been those involving the review of administrative, legislative and private voluntary preferential treatment schemes, *see, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *H. Earl Fullilove, et al.* v. *Klutznick, et al.*, 100 S. Ct. 2758 (1980); *United Steelworkers of America* v. *Weber*, 443 U.S. 192 (1979); as well as cases which addressed the use of statistics and evaluation of relevant labor markets in remedying discrimination, *cf. International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Furnco Construction Co.* v. *Waters*, 438 U.S. 567 (1978).

STATEMENT OF THE CASE

In 1974, the California Department of Corrections (the "Correctional Department") adopted an Affirmative Action Plan (AAP) which, as revised in 1975, had as its principal objectives: (1) increasing the number of female employees in the Department to a percentage level equivalent with that in the total "California labor force" in April 1970; and (2) increasing the number of "minority" employees to a level equalling at least 70% of any given "minority" in the inmate population of the Department (*i.e.*, State prisoners). Although these percentage goals were directed only to the level of employment of new female and minority employees, the AAP, in fact, was to be applied to other employment-related decisions as well, including transfer and promotion. (Cert. Pet. App. A-5).

The AAP was challenged in California Superior Court by the California Correctional Officers Association representing male Caucasians who were employed by the Correctional Department, and who alleged that under the Plan they were denied promotions because of their race in favor of persons who were given preferential treatment. Although the California Court of Appeal found a conflict in the evidence as to how widely the preferential policies expressed in the Plan were pursued, it determined that where they had been applied, preferences were given to female sex or minority status to the extent that such status was considered a "plus" factor in the assessment of an employee for promotion or transfer. The Court also noted that some vacancies were left open and transfers and promotions delayed

until qualified female or minority employees could be found to fill them. (Cert. Pet. App. A-6). Although the trial court found there was discrimination in hiring, the court of appeal determined that the exercise of the preference was limited to the promotion, transfer or work assignment of *employees* only. *Id.*

In answers to interrogatories, the Department *denied* that it had engaged in intentional or willful discrimination against minorities or women. It also stated, however, that its past hiring practices and procedures had an adverse discriminatory impact on certain minorities and the female sex. "This statement," according to the California Court of Appeal, "was the only substantial reference in the evidence to the effect that the Department's personnel practices had discriminated against females and minorities in the 'past'." (Cert. Pet. App. A-7).[3]

The California Superior Court granted relief and entered a preliminary injunction prohibiting the Correctional Department from continuing to carry out its AAP. The order was subsequently reversed by the California Court of Appeal, which found, *inter alia*, that the AAP did not violate the Equal Protection Clause of the fourteenth amendment to the Constitution. Without elaboration, the court found that there was a compelling state interest in the "safe and efficient operation" and "proper management" of the correctional system. (Cert. Pet. A-15 through A-17). No record evidence, in the

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[3] The trial court's order denying the Department's motion to supplement the record with evidence of past discriminatory hiring practices was affirmed by the California Court of Appeal. (Cert. Pet. App. A-23).

AAP or elsewhere, was cited to support these conclusions. Moreover, the appellate court did *not* state that eliminating the effects of past discrimination was part of its rationale for approving the AAP. The California Court of Appeal reversed the permanent injunction, and the Supreme Court of California denied a hearing.

SUMMARY OF ARGUMENT

In concluding that the AAP was constitutionally permissible, the California Court of Appeal erred, not only in its failure to ascertain the sufficient government interest that would permit such a preference, but, assuming the interest existed, in its approval of forms of hiring ratios rationally unrelated to the AAP's implementation.

Whatever the probative significance of statistical evidence indicating adverse impact, this Court has declared that the state may establish otherwise impermissible racial classifications only where it seeks to remedy prior discrimination, and then only where appropriate findings of such discrimination have been made. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Accordingly, unless the Correctional Department had adopted the racially preferential formula in its AAP with the expressed intention of remedying discrimination and made appropriate findings directly related to that purpose, its actions cannot withstand a constitutionally-based challenge by identifiable, incumbent employees whose expectations of transfer and promotion rights are adversely affected directly. This is certainly the case here, for not only was there no showing that past discrimination had triggered the

preference, but the record indicates that the state administrative body made no finding *at all* with respect to preference justification. Indeed, only after the initiation of litigation did the Department tender any justification, and then only on the basis of a conclusory statement that its policies had had an adverse impact on certain groups. Moreover, the California Court of Appeal ignored even this justification, and made a determination, *sua sponte*, and with no record support, that the "safe and efficient operation of correctional facilities" constituted a sufficient compelling state interest to justify the use of preferential instruments. As there is no constitutional motivation on the record for the racial and sex-based classifications, they must inevitably fall.

Equally significant in the constitutional evaluation of this case is that even if the state agency had demonstrated a constitutionally sufficient purpose, the AAP it sought to enforce was not at all suited to the accomplishment of that purpose. At least two distinct and necessary elements constitute the relevant market: *qualifications* and *geographic location*. When special qualifications are required to fill particular jobs, inferences of discrimination are unjustified if comparisons are made of an employer's work force to the general population, rather than to the smaller group of individuals who possess the necessary qualifications. In all events, the qualified labor market by definition never encompasses the non-labor population. *Hazelwood School District* v. *United States*, 433 U.S. 321 (1977). The geographic scope of statistics also must be carefully circum-

scribed to compare an employer's work force only with the population of the community from which the employer can be expected to hire. *Id.*

In this case, the Correctional Department's AAP sought to increase the number of "minority" employees to a level equalling at least 70% of any given "minority" in the inmate population of the Department (that is, the percentage of minorities among State prisoners). From the standpoint of qualifications, this is an appallingly inappropriate comparison, as the level of minority representation in the prison inmate force bears no relationship to the available, qualified applicant pool in the labor force. With respect to the female preference, it is primarily the geographic aspect of availability that has been distorted. The Department's AAP mandates increasing the number of female employees to a percentage level equivalent with that in the total "California labor force" in April 1970. It is the geographic area from which applicants would ordinarily come, however, that constitutes appropriately the geographic element in relevant labor market determination. Thus, the geographic area should have been limited to the appropriate area surrounding particular employment facilities rather than based on statewide figures.

As litigants and public policy makers rely ever increasingly on statistical evidence in employment discrimination cases, the need for sound statistical methodology grows proportionately. Yet, if a state government can adopt for itself, or mandate for private parties, availability standards that are wholly at odds with sound and accepted principles of labor

market determination, as it has sought to do here, a critical means for evaluating job bias claims and for formulating job bias remedies will have been rendered meaningless.

ARGUMENT

I. The Correctional Department's Preferential Employment Practices, Promulgated Without Appropriate Findings of Discrimination, Violated the Fourteenth Amendment Rights of Nonminority Employees

A. *Controlling Principles*

This case presents a purely constitutional issue, requiring the application of constitutional standards to state action that is inherently suspect. The constitutional standards are those emanating from the fourteenth amendment's Equal Protection Clause, and they are to be applied here to a state administrative agency's promulgation of what patently constitutes a race and sex-based preferential scheme.

This Court has recently reviewed in another context the legality of a state administrative agency's promulgation of a racial preference scheme. In the *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the Court held unconstitutional a rigidly applied admissions policy that reserved a set number of medical school slots exclusively for minority applicants. The case elicited six separate opinions by this Court, and although a majority of the Court also ruled that race may be taken into account as one of the many factors determining the validity of preferential treatment to minorities, a majority of the Court agreed that the ruling at least meant that *preferential treatment by government authorities may be given only pursuant to an ad-*

ministrative, judicial or legislative finding of discrimination by the employer or industry. As Justice Powell observed, "we [the Court] have never approved preferential classifications in the absence of proven constitutional or statutory violations (footnotes omitted)." 438 U.S. at 302. Moreover, he underscored that "[w]e [the Court] have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations." *Id.* at 307, *citing Teamsters* v. *United States*, 431 U.S. 324, 367-76 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. at 155-56; *South Carolina* v. *Katzenbach*, 383 U.S. 308 (1966). On this point Justice Brennan, in an opinion joined by Justices White, Marshall and Blackmun, agreed that:

> Government may take race into account if it acts not to demean or insult any racial group, but to remedy disadvantage cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

438 U.S. at 325.[4] The four remaining Justices sub-

[4] That a preferential scheme can be justified under the fourteenth amendment only by a showing of past discrimination enjoys sound logical justification: only because race previously was taken into account in decision-making to the detriment of certain races could there be any justification for taking it into account again to rectify any initial injustice. See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1289-91 (1970). Without the corrective element, any racially preferential scheme becomes

scribing to the opinion of Justice Stevens would have found the *Bakke* plan unlawful even on statutory grounds.

So crucial is this requirement of findings of past discrimination in the judicial review of government-sanctioned racial preference that it has been applied even to the enactment of racial preference programs by the Congress, which, unlike a state administrative agency, enjoys broad and unique remedial powers to cure the effects of prior discrimination. See *H. Earl Fullilove, et al.* v. *Klutznick, et al.*, 100 S. Ct. 2758 (Burger, C.J.).

Accordingly, in order to withstand constitutional scrutiny, the Correctional Department's AAP must have based its preferential scheme on *appropriate findings* of *past discrimination.* As we explain below, on both these counts the AAP is lacking and thus violates the fourteenth amendment rights of the individual petitioners.

B. *The Correctional Department's AAP Lacked Appropriate Findings of Past Discrimination*

As the record makes clear, the AAP contains no findings of discrimination, its purpose being simply "to insure [sic] compliance with equal employment opportunity laws and departmental policy." (Cert. Pet. App. A-5).[5] Without such findings, however, the

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merely the personal policy preferences of administrators, unrestricted by meaningful judicial review.

[5] Typically, however, equal employment statutes do not require, *ab initio,* preferential treatment absent a finding of discrimination. *See, e.g., International Brotherhood of Teamsters* v. *United States,* 431 U.S. at 340, n.20 ("Title VII imposes no requirement that a workforce mirror the general population").

AAP's preferences serve merely as arbitrary and capricious mechanisms for awarding employment and promoting employees.

The California Court of Appeal nevertheless determined that the AAP's preferences served "compelling state interests" and thus were constitutional. The court divined the existence of a compelling interest for the preference on the grounds of "safety," "efficiency," and "proper management" of the state's correctional system. (Cert. Pet. A-14 through A-17). Yet, no record evidence was cited to support these conclusions, and it does not appear that these factors were included in the Department's initial reasons for adopting the Plan. Equally important, the court did *not* state that eliminating the effects of past discrimination was part of its rationale for approving the Plan.

The fourteenth amendment, of course, requires a careful inquiry into motivation, in part to ensure that public officials have indulged in racial classification only to fit *best* the goal invoked in its defense. By limiting racial and sex preferences to carefully delineated circumstances, the actions of administrative officials are channeled in ways that can be evaluated with comparative ease by courts and which then, in turn, can more readily be examined on appeal. The California court's reliance on its self-developed rationale of safety and efficiency to uphold the preference guarantees no such administrative or judicial accountability. Indeed, the safety and efficiency of the prison system theoretically could support a wide variety of administrative actions. For example, permanent racial segregation of prison inmates might happen to serve the goals effectively.

But just as these goals presumably would not legitimate such action, they do not justify racial classification in the prison employment system.

In sum, it is only the remedying of discrimination which may arguably be relied upon to permit racial classifications to be established by public bodies. There are no constitutional grounds for approving such classifications on the basis of ruminations or *ipse dixit* of a court as to possible concerns for safety and efficiency of administration, particularly where, as here, such classifications impact adversely upon the promotion and transfer expectations of innocent, identifiable incumbent employees. *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991. Moreover, that the Correctional Department itself did not see fit to articulate these considerations as the motivating force for the classifications highlights the lack of support in the record for the judgment of the California Court of Appeal.

Because the California Court of Appeal failed to address the reasons, if any, the Correctional Department had for promulgating its preference scheme, its constitutional analysis is critically impaired. The inadequacy of its review is particularly striking in light of its expressed intent to apply "strict scrutiny" to the AAP. (Cert. Pet. App. A-14) See *Loving* v. *Virginia*, 388 U.S. 1 (1967). For so impaired is the AAP by the Department's failure to make a record that strict scrutiny, with its accompanying presumption of unconstitutionality need not be invoked. Measured only in terms of whether the AAP's preference serves "important government objectives," *Califano* v. *Webster*, 430 U.S. 313 (1977), the silence

of the plan with respect to past discrimination ends the search for such objectives practically before it begins.

II. Even If the Plan was Adopted to Remedy Discrimination, the State's Racial Preference Program Was Not Suited to the Accomplishment of that Purpose

A. *Introduction*

In *Teamsters* v. *United States*, 431 U.S. at 340 n.20 (1977), this Court articulated, within the context of Title VII, the role of statistical evidence in pattern or practice discrimination cases:

> Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a tell-tale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial or ethnic composition of the population in the community from which employees are hired.

A legally fatal characteristic of the Correctional Department's AAP is its strictly results-oriented approach. The AAP fashions percentage goals for entry-level positions absent the underlying statistical evidence which *may* have served to establish a *prima facie* case of discrimination. Without such evidence, the Court can review the validity of the AAP's preferential scheme only by working backwards, that is, by drawing the questionable conclusion that probative evidence of discrimination existed based on the untested assumption that the number of minorities and women hired or employed was disproportionate to their number available in the relevant job market.

See *Hazelwood School District* v. *United States*, 433 U.S. at 310-13; *Teamsters* v. *United States*, 431 U.S. at 342 n.23. As indicated below, however, an appropriate analysis of the relevant job market never was undertaken.

The usefulness of statistical methodology as an aid to identifying discrimination, and thus in fashioning appropriate remedies, depends upon the identification of an appropriate comparative data base, typically incorporated within the concept of the "relevant labor market." This defines the pool of qualified people from which an employer draws applicants.

Two major elements comprise the relevant labor market: *qualifications* and *geographic location*. Other factors, such as the relevant time frame, also play an important role in developing reliable statistical evidence comparing the qualified labor force with the employer's work force. Where special qualifications are required to fill particular jobs, courts in equal employment litigation typically require complainants seeking relief to come forward with "qualified labor market" statistics based on these factors. *See, e.g.*, *Roman* v. *ESB, Inc.*, 550 F.2d 1343 (4th Cir. 1976); *EEOC* v. *Radiator Specialty Company*, 610 F.2d 178 (4th Cir. 1979); *Pack* v. *Energy Research and Development Administration*, 566 F.2d 1111 (9th Cir. 1977). Of course, "once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show" that the plaintiff's statistics are improper, misleading, or distorted. *Hazelwood*, 433 U.S. at 309. In the posture in which this case is presented, however, neither the California courts nor this Court has before it the

sufficiently fine-tuned work force statistics necessary to evaluate whether the AAP's percentage goals are based upon anything other than arbitrary administrative determinations.

If work force statistics are not tailored to the qualified labor pool and to the appropriate geographic scope, an inference of discrimination is not reasonable or permissible, since any resulting disparity may be caused by numerous factors other than discrimination. Indeed, as this Court has observed, broad based statistics which include a substantial number of people who realistically cannot be considered potential applicants are "virtually irrelevant" for comparison purposes. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 586 (1979). *See also Hazelwood School District* v. *United States*, 433 U.S. at 308 n.13.

As will be explained below, in setting percentage goals for minorities and women, the Correctional Department's AAP ignored in the case of "minorities" the need to compare the employer's work force to the qualified labor pool and, in the case of women, the need to define the proper geographic scope for evaluating its projected work force. In so doing, its goals became arbitrary and capricious mechanisms for enforcing preferential treatment which were unrelated to remedying discrimination and which impacted adversely on identifiable incumbent employees.

B. *The Correctional Department's Establishment of Minority Employment Goals Based Upon Inmate Population Served No Recognizably Remedial Purpose*

The Correctional Department's AAP included, as a stated goal, increasing the number of "minority" employees to a level equalling at least 70 per cent of any given "minority" in the inmate population of the Department. That the comparison of correctional employees to correctional prison inmates misconceives the role of statistics in employment discrimination cases is patent, and, under *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), cannot stand.

In *Hazelwood*, the district court absolved the school district of unlawful employment practices on the basis of the paucity of black students in the Hazelwood schools. 392 F. Supp. 1276, 1287-88. The court of appeals concluded that the district court had erred in comparing the percentage of black teachers in the district with the percentage of black students in its schools rather than with the percentage of black teachers in the relevant labor market area. "The level of black student enrollment in Hazelwood school," said the court, "sheds no light whatsoever upon the dispute before us, . . ." 534 F.2d 805, 812. This Court agreed with the court of appeals (433 U.S. at 308):

> that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the

> racial composition of the qualified public school teacher population in the relevant labor market (citation and footnote omitted).

Hazelwood unequivocally established that probative statistical evidence involves a comparison, *inter alia*, of the "qualified labor market," at least in cases such as here, where the jobs in question are not ones for which the general public is presumptively qualified. Indeed, where labor force data are not reasonably tailored to those qualified for the jobs in question, courts frequently consider the statistical error fatal to employment discrimination suits. See *Roman* v. *ESB*, 550 F.2d 1343 (4th Cir. 1976); *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946; and *Holder* v. *Old Ben Coal Co.*, 618 F.2d 1198 (7th Cir. 1980) (simply because a job is catagorized as "unskilled" does not necessarily mean that certain qualification or experience may not be required by the employer).[6] Such an approach is consistent not only with the policy of promoting sound statistical methodology, but also with the constitutionally-mandated need to protect the rights of innocent employees. As the Second Circuit stated in *Rios* v. *Enterprise Ass'n of Steamfitters, Local 638*, 501 F.2d 622, (1974):

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[6] The Correctional Department's use of the inmate population as the measure for projected minority employment is not unlike those instances in which it has been held impermissible for employers to adjust the racial or sexual profile of its work force in accordance with actual or perceived customer or client preference. See *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971); 29 C.F.R. § 1604.2(iii) (refusal to hire individual because of the preferences of clients or customers unlawful).

> [W]e believe that from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable reverse racial discrimination, which is not. (Citation omitted.)[7]

Unlike *Rios*, however, the record here contains no showing of discrimination against qualified non-white applicants.[8] Thus, the Correctional Department's ar-

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[7] In *Rios*, the district court had ordered a goal of thirty percent nonwhite membership in a union which had discriminated against qualified non-white applicants for membership. On appeal, however, the district court's order was remanded for a reassessment and recalculation of the percentage goal. The Second Circuit based its remand order on the fact that the union's membership was not drawn from the entire population, but rather consisted of male workers over 18 years of age. Persons under eighteen, whether minority or non-minority, were not admitted into the union or its apprenticeship program. Thus, even absent racial discrimination, "the non-white members of the Union would have been drawn from the male work force over 18 years of age in the Union's jurisdiction." 501 F.2d at 632.

[8] The Correctional Department's Affirmative Action Program Assessment shows, in fact, that even in terms of general population figures, as of 1973, black personnel in the Department were overrepresented by approximately 2.5% of their expected proportion. Ex. R. See *Guardians Ass'n of N.Y. City Police Dept.* v. *N.Y.C. Civil Service Commission*, DLR No. 170, D-1, D-21 (2d Cir. July 31, 1980):

> If the disparity between existing minority employment and relevant work force percentage were extreme and long-standing, that circumstance alone might justify some affirmative relief, especially if minority employ-

bitrary percentage goals simply compound the constitutional infirmity with which the AAP already suffers.

C. *The Correctional Department's Use of Statewide Female Employment Statistics to Establish a Percentage Goal Was Improper*

The *Hazelwood* Court also underscored the importance of considering the proper geographic scope of statistics in measuring accurately the existence *vel non* of adverse impact in hiring practices. Proper geographic scope can depend on a number of factors, including the skills involved, the level of compensation, the scope of recruting practices by competing employers, and the commuting patterns and availability of public transportation. 433 U.S. at 308; *see also Stastny* v. *Southern Bell Telephone & Telegraph Co.*, 23 FEP Cases 665, 674-75 (4th Cir. 1980); *Lim* v. *Citizens Savings and Loan Association*, 430 F. Supp. 802 (N.D. Cal. 1976); *Abron* v. *Black & Decker Mfg. Co.*, 439 F. Supp. 1095 (D. Md. 1977). Whatever factors are deemed most compelling in a particular situation, it is generally acknowledged that statistical comparisons based on an overly broad population pool are of limited usefulness. For a disparity is probative of discrimination only to the extent that it arises from a comparison of the employer's work force with the population of the *community from which the employer can reasonably be expected to hire.*

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ment were low. But where, as here, the disparity is not extreme and minority employment is not insubstantial, an affirmative hiring remedy must be based on detailed findings, supported by evidence, that there exists a pattern of prior discrimination warranting such relief.

In accordance with these principles, a relevant geographic area *may* be the city or county in which the employer is located, or the standard metropolitan statistical area. In all events, the distance which individuals can be expected to travel to a workplace, particularly to a non-urban workplace which is not served by convenient public transportation, can be a significant factor in determining the relevant labor market. Thus, for example, in *Timken* v. *Vaughan*, 413 F. Supp. 1183 (N.D. Ohio 1976), the district court refused to accept the conclusions of the administrative law judge and the arguments of the government that a highly industrialized urban center with a large minority population percentage should be included in the area from which the employer could reasonably expect people to commute for work. The government's administrative findings were subjected to close analysis and found to be arbitrary, capricious, an abuse of discretion and not supported by substantial evidence. *See also United States* v. *County of Fairfax*, 23 FEP Cases 485, 490 (4th Cir. 1980) (lack of transportation and differences in wage rates were valid reasons for excluding urban area from relevant labor market area of suburban employer).

In the Correctional Department's AAP, the number of female employees in the Department was set to reach a percentage level equivalent with that in the total "California labor force" in 1970. Yet, factors such as a comparatively low female population in remote areas where some California prisons are located may make it wholly unrealistic to expect that women throughout the entire state of California will apply in proportion to their representation in the population.

CONCLUSION

In approving the Correctional Department's AAP, the California Court of Appeal failed to adhere to the constitutional limitations on preferential schemes imposed by governmental bodies to the detriment of the legitimate expectations of other employees innocent of wrongdoing. Furthermore, even had the need for relief been shown, the California court was in error in permitting the Correctional Department to base its percentage goals in hiring on inappropriate and irrelevant statistical factors. For these reasons, and those stated above, EEAC submits that the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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September 12, 1980

Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1213

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,

Petitioners,

against

CALIFORNA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES IN SUPPORT OF RESPONDENTS

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Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioners,

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES IN SUPPORT OF RESPONDENTS

Opinions Below

The opinion of the California Court of Appeal is reported at 95 Cal.App.2d 506, 157 Cal.Rptr. 260 (1979).

The order of the California Supreme Court denying Petitioners' Petition for Hearing is reported at 25 Cal.3d, Minutes 2 (No. 23 Cal. Official Reports).

Consent of the Parties

Pursuant to Rule 36 of the Rules of this Court, Respondent, by letter dated September 19, 1980, and Petitioners,

by letter dated October 7, 1980 gave consent for the New York State Department of Correctional Services to file a brief *amicus curiae.*

Interest of *Amicus*

The New York State Department of Correctional Services currently maintains 32 correctional facilities that house over 21,600 inmates. To carry out its statutorily mandated responsibilities to these inmates, the Department employs 11,757 persons in a myriad of job titles. As is true in California, historically very few of these employees have been members of ethnic-racial minority groups or women.

The State Department of Correctional Services has a vital interest in the outcome of this litigation for two related reasons.

First, similar relief has been implemented in litigation in New York. Since 1973, the Department has been a defendant in litigation challenging its employment practices as discriminatory. In *Kirkland* v. *New York State Department of Correctional Services,* 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part, rev'd in part,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), the Department's civil service examination for promotion to correctional officer-sergeant was challenged for having a discriminatory impact on black and Hispanic employees. The ultimate result of this litigation was the development of a new written test that was administered to candidates for promotion in December, 1978. Pursuant to district court directive, a validation study was done to determine if the new test was job-related. The validation study results revealed that black candidates scored on the average, 268 points lower than white candidates on the written portion of the test, and that both groups of candidates scored equally well on the performance portion of the test.

The Department then *voluntarily* added 250 points to the total scores of minority candidates. This race-conscious, voluntary remedy was specifically approved by the Second Circuit Court of Appeals. *Kirkland* v. *New York State Department of Correctional Services,* Slip. Op. 5071, Docket No. 80-7129 (2d Cir., August 18, 1980). The Department therefore is vitally concerned that voluntary efforts—such as California's and its own—designed to remedy the effects of demonstrated discrimination be approved by this Court. It should not be necessary for either the California or New York agencies to be compelled to defend lawsuits such as *Kirkland,* and, after seven years of expensive litigation, have courts order remedies the agencies could otherwise undertake voluntarily.

Second, and perhaps more importantly, the Department is now in the final stages of developing a comprehensive affirmative action program. Like California's this program is required by an executive order of the Governor that applies to all New York State agencies and departments,* and resulted from legislative and executive recognition of serious problems of past underutilization of ethnic-racial minorities and women in State employment.

The Department has structured its plan based on two considerations. First, that acknowledged past underutilization of minorities (and women) in all phases of employment requires specific goals and timetables as a remedy. Second, the increasing concentration of minority inmates requires a commitment to staff prisons with large numbers of minority corrections officers to ensure safety and promote rehabilitation.

Therefore, given New York State's strong commitment to voluntary affirmative action programs, *amicus* submits this brief uring affirmance of the decision below.

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* 9 New York Code Rules & Regulations § 3.40 (Governor's Executive Order 40.1).

Questions Presented

1. Does the Equal Protection Clause of the Fourteenth Amendment prohibit the California Department of Corrections from voluntarily adopting a race—and gender—conscious affirmative action program to further California's compelling interests of remedying the effects of past discrimination and furthering safety and rehabilitation in its prisons?

2. Does Title VII of the Civil Rights Act of 1964 prohibit the California Department of Corrections from voluntarily adopting a race—and gender—conscious affirmative action program to further California's compelling interests of remedying the effects of past discrimination and furthering safety and rehabilitation in its prisons?

Statement of Facts

Amicus curiae New York State Department of Correctional Services relies on the statement of facts contained in Respondents' Brief to this Court.

POINT I

The Department's Affirmative Action Plan does not violate the Equal Protection Clause of the Fourteenth Amendment.

A. The Affirmative Action Plan Does Not Impose an Unconstitutional Racial or Gender-Based Classification

The California Department of Corrections' (the "Department") Affirmative Action Plan ("AAP") does not classify employees according to race or gender, but merely requires consideration of these as positive factors in the evaluation of candidates for promotion. Thus, this case is entirely different from this Court's decisions striking

down racial- or gender-based classifications as violating the Equal Protection Clause. *E.g., Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978) (*"Bakke"*); *Loving* v. *Virginia,* 388 U.S. 1 (1967).

The difference between an unconstitutional racial classification and the constitutional consideration of race as a factor in an affirmative action program was of course discussed in detail by this Court in *Bakke.* There the admissions program reserved sixteen out of the 100 seats for minority applicants. Although the parties to the litigation disputed whether this reservation could more appropriately be characterized as a "quota" or "goal," this Court characterized that distinction as "semantic," and went beyond the labels to the substance of the program which raised constitutional questions:

> The special admissions program is undeniably a classification based on race and ethnic background. . . . Whether this limitation [of sixteen places] is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.
>
> *Bakke,* 438 U.S. at 289.

Unlike the program in *Bakke,* the Department's AAP draws no line based on race or gender. It does not contain any restriction on the numbers of employees of each race or gender who may be eligible for promotion; no employee may be promoted solely because of race or gender; and no employee is denied consideration for promotion because he or she is white, or male. Rather, the AAP embodies precisely what Justice Powell in *Bakke** described as permissible use of race in an evaluative procedure: race (and here, gender) are considered positive factors in an overall promotion system which looks to many factors before each

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* *A fortiori,* the AAP is acceptable to a majority of this Court under the reasoning of Justice Brennan's opinion in *Bakke.*

decision is made. *Bakke,* 438 U.S. at 318. *See also, Kirkland* v. *New York State Department of Correctional Services,* Slip. Op. at 5076, Docket No. 80-7129 (2d Cir. August 18, 1980).

Petitioners make much of the percentage goals for minority employment contained in the AAP, and the Department's overall objective of balancing the inmate and employee populations according to race.* However, petitioners fail to acknowledge that these percentages had nothing whatsoever to do with the actual operation of the AAP in selecting or promoting employees. No percentages were applied to require a certain number of minority promotions or hires.** Instead, the Department used competitive civil service examinations, ranked the applicants, and, pursuant to California law, limited selection to one out of the three highest scores. Only then would race be considered as a factor in choosing from among candidates. The results—which belie petitioners' contentions—were that over 70% of the persons promoted under the AAP are non-minority. The AAP treats each applicant as an individual and

> the applicant who loses out . . . to another candidate receiving a 'plus' on thebasis of ethnic background will not have been foreclosed from all consideration

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* This objective incorporated the Law Enforcement Assistance Administration guidelines directing the percentage of minorities in the workforce to constitute 70% of the minority inmate population. See 38 Fed. Reg. 23516; 23 C.F.R. § 42.306(c).

** Even fixed percentages for hiring or promotion are not always unconstitutional. *See Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commn.,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975); *Guardians Assn. of the New York City Police Department* v. *Civil Service Commn. of the City of New York,* Slip Op. 4755, Docket No. 80-7027 (2d Cir. July 31, 1980). Justice Powell acknowledged this in *Bakke* concluding that the special admissions program would have passed constitutional muster had certain findings of past discrimination been made. (See below.)

for that seat simply because he was not the right color or had the wrong surname.

Bakke, 438 U.S. at 319 (Opinion of Powell, J.).

B. In Any Event, the Department's Consideration of Rate and Gender in Promotion and Hiring Is Constitutional

This Court has repeatedly determined that governmental use of racial criteria is not necessarily a violation of the Equal Protection Clause. *Fullilove* v. *Klutznick,* —— U.S. ——, 48 U.S.L.W. 4979, 4988 (July 2, 1980) (*"Fullilove"*); *Bakke,* 438 U.S. 265, 287 (Powell, J.); *United Jewish Organizations of Williamsburg, Inc.* v. *Carey,* 430 U.S. 144, 161 (1977) (*"UJO* v. *Carey"*). Government affirmative action plans like the one at issue here satisfy this Court's "strict scrutiny" test if they are "a necessary means of advancing a compelling governmental interest." *Fullilove,* 48 U.S.L.W. at 4992 (Powell, J.); *Bakke,* 438 U.S. at 305 (Powell, J.).*

1. The State of California Has A Compelling Interest In Alleviating The Effects Of Prior Discrimination In Its Department of Corrections

At the time of the development of the AAP, race and sex discrimination in employment by the California Department of Corrections were matters of established fact, if not outright Department policy.** The Department's voluntary efforts to eliminate the effects of these discriminatory practices further a compelling interest, as this Court has

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* Moreover, gender-based classifications have been approved by this Court to remedy the effects of general, societal discrimination. *Califano* v. *Webster,* 430 U.S. 313, 317 (1977); *Kahn* v. *Shevin,* 416 U.S. 351, 353-355 (1974). Clearly then the Department's AAP, designed to remedy the effects of its prior policy of excluding women from positions in the Department, is constitutional. *See Schlesinger* v. *Ballard,* 419 U.S. 498, 508-509 (1975).

** See Statement of the Case contained in Respondent's Brief.

repeatedly held. *Bakke,* 438 U.S. at 307; *Fullilove,* 48 U.S.L.W. at 4986 (Opinion of Burger, C.J.), 4992 (Powell, J. concurring); *UJO* v. *Carey,* 430 U.S. at 156-159; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971); *Green* v. *County School Board,* 391 U.S. 430, 437-438 (1968). The use of racial criteria or classifications to remedy past discrimination is justified where a duly-empowered body—executive, legislative or judicial—makes findings of past discriminatory practices.

> Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In Bakke, the Regents failed both requirements.
>
> *Fullilove,* 48 U.S.L.W. at 4992-4993.*

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* Although the specific language of this test is contained in the separate opinion of Justice Powell, it is clear that the Chief Justice and Justices Brennan, White, Marshall and Blackmun agreed that congressional findings of past discrimination justified the race-conscious remedy of the Minority Business Enterprise ("MBE") provision of the Public Works Act of 1977.

> "The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an

(footnote continued from preceding page)

The Department's AAP satisfies both of these requirements. *First,* clearly state legislatures and executives, as well as Congress and the federal courts, possess authority to make findings and impose remedies for race and sex discrimination. *E.g., Price* v. *Civil Service Commission of Sacramento County,* 161 Cal.Rptr. 475, 604 P.2d 1365 (Sup. Ct. 1980), *appl. pndg.; Detroit Police Officers' Assn.* v. *Young,* 608 F.2d 671, 694 (6th Cir. 1979), *petition for cert. pndg.* (No. 79-1080); *Maehren* v. *City of Seattle,* 92 Wash.2d 480, 599 P.2d 1255 (Sup. Ct. 1979), *petition for cert. pndg.* (No. 79-1061). In fact, state legislatures and executives have unique authority regarding hiring and promotion of a state's own employees. *See, e.g., National League of Cities* v. *Usery,* 426 U.S. 833 (1976). And certainly once findings are made, the legislature or executive may direct subordinate agencies or departments to carry out the remedial mandate by, for example, requiring the development of affirmative action plans.

Secondly, in this instance, California made substantial legislative and executive findings of past discrimination to justify the development of a race- and gender-conscious affirmative action program. In 1971 and again in 1977 (prior to the extension of the AAP in 1979) the California

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(footnote continued from preceding page)

effect on interstate commerce. Thus Congress could take necessary and proper action to remedy the situation." *Fullilove,* 48 U.S.L.W. at 4986. (Opinion of the Chief Justice).

"As the Court demonstrates . . . it is indisputable that Congress' articulated purpose for enacting the set-aside provision was to remedy the present effects of past racial discrimination. . . . In these circumstances, remedying these present effects of past racial discrimination is a sufficiently important governmental interest to justify the use of racial classifications." *Id.* at 4998. (Opinion of Justice Marshall).

legislature held hearings and considered evidence of discriminatory employment practices in state civil service. As a result the legislature issued directives designed to improve the existing employment situation, evidencing a commitment to non-discriminatory employment practices. Included on both occasions were specific directives to implement affirmative action programs. Furthermore, beginning in 1971, then-Governor Reagan made findings and issued executive orders regarding discrimination in state employment. His final order requiring that written affirmative action plans be developed by each state agency and department provided the mandate for the Department's development of the plant in question here.

Clearly therefore, the Department did not make its own findings of discrimination or develop the AAP in isolation (as did the Davis Medical School), but did so as the result of concrete legislative and executive mandates. Cf. *Bakke,* 438 U.S. at 309 (Opinion of Powell, J.). In addition the Department, the agency of state government closest to and most familiar with past discriminatory practices and policies, made its own findings prior to the development of the AAP. In essence, the state *admitted* the existence of discrimination and its own responsibility to correct it.*

A holding in this case that state governments and agencies do not have the authority to make such findings or voluntarily adopt appropriate remedies will only serve to discourage candor and prompt remedial action by state governments. In fact, the result of a ruling in favor of petitioners will be that *all* victims of discrimination will be required to resort to our already overburdened courts for vindication of their rights to be free from unlawful

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* This type of self-analysis of unlawful practices—perhaps risking potential liability—is therefore particularly likely to be searching and accurate. One would assume that the Department would err—if at all—on the side of not finding past discrimination and present disproportionate results.

discrimination.* And avoidance of litigation is not all that is at stake here. As this Court itself has acknowledged, remedial programs undertaken voluntarily are met with less resistance and greater acceptance than those which are imposed, *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) (*"Weber"*), and this is especially so when the legislature *and* executive have both indicated approval.

2. The State of California Has A Compelling Interest In Ameliorating Prison Conditions

Remedying the effects of past discrimination is not the sole compelling governmental interest that will justify race-conscious affirmative action programs. In *Bakke,* Justice Powell found that the state's interest in ensuring a diverse student body could justify a race-conscious admissions program though not the specific program at issue there. *Bakke,* 438 U.S. at 311-315.

As is evident from many decisions of this Court, states have an overriding interest in ensuring safety—both of prisoners and employees—in their correctional facilities. *Bell* v. *Wolfish,* 441 U.S. 520 (1979); *Pell* v. *Procunier,* 417 U.S. 817 (1974); *Procunier* v. *Martinez,* 416 U.S. 396 (1974). Moreover, once a state chooses to incarcerate an individual it acquires a substantial interest in, if not an obligation to provide for, that prisoner's rehabilitation.

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* "Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action." *Bakke,* 438 U.S. at 364 (Opinion of Brennan, White, Marshall and Blackmun, JJ.). *See also Detroit Police Officers' Assn.* v. *Young,* 608 F.2d at 694.

There can be no doubt that racial tensions have contributed to unsafe and volatile prison conditions and have hampered rehabilitative efforts in institutions where there are many minority inmates and few minority corrections officers. A state is certain free to conclude, as California has here, that a corrections officer and employee population that more closely reflects the racial composition of inmate population will significantly advance the interests of safety, peace and rehabilitation. There was substantial evidence below to support these conclusions.

3. The AAP Is A Necessary Means To Further California's Compelling Governmental Interests

It is abundantly clear from the record below that absent consideration of race and gender in hiring and promotion decisions, the gross under representation of minorities and women in the Department's workforce would continue. A Similar remedy for the construction industry was deemed necessary by Congress, and was approved by this Court in *Fullilove*. 48 U.S.L.W. at 4988, *et seq.**

Moreover, the AAP does not raise any of the problems with race-conscious programs outlined by this Court. It is narrowly drawn so as not to disadvantage any particular white or male employee, *all* of whom are still eligible for *all* promotions under the AAP. (In fact, petitioners can point to no one individual who has been disadvantaged by the AAP.) The AAP, fitting into the California civil service framework, operates in tandem with waiver and grievance mechanisms, and is subject to extensive oversight. More importantly perhaps, and unlike the *Fullilove* situation, the California legislature and executive branches

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* The *Fullilove* court paid particular and appropriate deference to Congress in fashioning a remedy for historic discrimination in this industry. No less deference should be paid to properly authorized state officials in fashioning a remedy to further their compelling interests.

did not have to mandate affirmative action for unwilling third parties, but undertook it themselves, voluntarily. *Cf. Weber,* 43 U.S. 193.

POINT II

The Department's Affirmative Action Plan does not violate Title VII.

In *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979), this Court held that voluntary, race-conscious affirmative action plans are permissible under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* if "[t]he purposes of the plan mirror those of the statute" and "the plan does not unncessarily tramel the interests of white employees." 443 U.S. at 208. The purpose of Title VII and the plan in *Weber*—"to eliminate conspicuous racial imbalance in traditionally segregated job categories"—clearly is also the objective of the AAP. And, as discussed above, interests of white employees are only minimally affected by the APP.

To dispose of petitioners' claims of violations of Title VII, it suffices to point out that, since 1972, the employment practices that are forbidden or permissible under Title VII are the same for government and private employers. *Dothard* v. *Rawlinson,* 433 U.S. 321, 331 n. 14 (1977).

Finally, the AAP was adopted by the Department voluntarily, and without the necessity of a judicial finding of discrimination or remedial order. As stated by Mr. Justice Brennan in *Weber,* 433 U.S. at 204:

> The very statutory words [of Title VII] intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ig-

> nominious page in this country's history," Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

It would perhaps be more ironic still if this law were held to prohibit states from voluntarily taking measures, which may serve as an example to all private employers, to remedy the discriminatory effects of their own past practices.*

---

* It should also be noted that the plan in *Weber* involved a 50% "quota" or set-aside for minority employee-trainees. In merely considering race and gender as "plus factors" the Department's AAP is not nearly as rigid as the plan approved by this Court in *Weber*.

CONCLUSION

For the above-stated reasons, the decision of the Court of Appeal, First Appellate District of the State of California should be affirmed.

Dated: New York, New York
October 15, 1980

Respectfully submitted

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Supreme Court, U.S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK; HENRY J. DARDEN; and CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS and JERO J. ENOMOTO, in his official capacity as Director of the California Department of Corrections,
Respondents.

On Writ of Certiorari to the California District Court of Appeal for the First Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS WAYNE MINNICK, ET AL.

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees com-

posed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument regarding the issues at stake in cases such as the present one wherein a governmental agency has adopted an employment and promotional program that grants preferences on the basis of the applicant's race or sex, thus affecting the rights of persons not included in the preferred group.

OPINION BELOW

The opinion of the California District Court of Appeal for the First Appellate District is reported at 95 Cal. App. 3d 506 (1979).

STATEMENT OF THE CASE

In 1974, respondent California Department of Corrections (Department) adopted a program entitled "Affirmative Action Plan" (AAP). The basic purpose of the plan was to increase the number of female employees in the Department to a percentage level equivalent to the percentage of females in the California labor force as of April, 1970, and to increase the number of racial and ethnic minority employees to a level equaling at least 70% of that particular racial or ethnic minority in the state prisoner population. When related to employment within the Department, these figures translate to an employment level

of 38% female and 36% racial or ethnic minority. Although the preference given to female and racial or ethnic minority applicants was described as a "plus factor," there was evidence that positions within the Department were held open until a qualified female or racial or ethnic minority applicant could be found. Further, there was evidence that some positions within the Department had been labeled "female only," "Asian only," "Black only," "Native American only," or "Spanish Surname only."

There was no evidence that the Department had, in the past, discriminated against either females or racial or ethnic minorities in its hiring practices. Nor was there any evidence that the AAP was adopted as a remedial measure pursuant to legislative or departmental findings of past discrimination in the hiring and promotion of the preferred groups. The sole reason put forward by the Department for granting the preferences was to

> "serve inmate-related objectives of the department by improving relationships with prisoners and reducing severe racial conflict and violence within the state prison system." *Minnick v. Department of Corrections,* 95 Cal. App. 3d 506, 514 (1979).

SUMMARY OF ARGUMENT

1. Gender based classifications that do not further an important governmental interest are prohibited by the Equal Protection Clause of the Fourteenth Amendment.

2. Respondents have failed to articulate an important governmental interest that would support the gender based classifications of the AAP.

3. Racial and ethnic classifications that are not necessary to further a compelling governmental interest are prohibited by the Equal Protection Clause of the Fourteenth Amendment.

4. Respondents have failed to demonstrate that the racial and ethnic classifications of the AAP are necessary to further a compelling governmental interest.

ARGUMENT

I

GENDER BASED CLASSIFICATIONS THAT DO NOT FURTHER AN IMPORTANT GOVERNMENTAL INTEREST ARE PROHIBITED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

While gender based classifications are apparently not considered suspect (*See Craig v. Boren*, 429 U.S. 190, 197 (1976); *but see Frontiero v. Richardson*, 411 U.S. 677, 682 (opinion of Brennan, Douglas, White, and Marshall, JJ) (1973)), they are disfavored (*Craig*, 429 U.S. at 217 (Burger, C. J., *dissenting*)) and, thus, must be substantially related to the achievement of an important governmental interest (*Califano v. Webster*, 430 U.S. 314, 316-17 (1977) (per curiam); *Craig*, 429 U.S. at 197)). In the instant action, the California Department of Corrections has admittedly classified its employees according to their gender, pursuant to the AAP, for purposes of assignment, transfer, and promotion. Thus, the Department must show both an important governmental interest to support the AAP and how gender based classifications are substantially related to the advancement of that objective.

This Court has, in the past, upheld gender based classifications that grant a preference to females. *See, e.g., Califano v. Webster, supra*; *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974). Although *Schlesinger* and *Kahn* were decided pursuant to a lesser standard than that applied in later cases (*compare Schlesinger*, 419 U.S. at 509, *and Kahn*, 416 U.S. at 355, *with Webster*, 430 U.S. at 316), the results in those cases apparently have been reaffirmed (*see Webster*, 430 U.S. at 317). The common thread that runs through these cases is a legislative finding that the preference would reduce disparities in available opportunities and economic position between males and females that were caused by past discrimination. *Id.* at 318; *Schlesinger*, 419 U.S. at 508; *Kahn*, 416 U.S. at 353.

Unlike *Webster*, *Schlesinger*, and *Kahn*, however, the gender based classification of the AAP in the instant action was not the product of legislative action and there were no findings by the Legislature of past employment discrimination against females in the Department of Corrections. The gender based classifications of the AAP were solely the product of the Department. *See Minnick*, 95 Cal. App. 3d at 513. Further, the Department of Corrections neither made findings of past discrimination nor introduced evidence of such discrimination. *Id.* at 513, 516. Indeed, any such findings made by the Department would be irrelevant.

In his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell stated:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307 (opinion of Powell, J.).
>
> "Petitioner [University of California] does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." *Id.* at 309 (opinion of Powell, J.).

Similarly, the basic purpose of the California Department of Corrections is the supervision of California prisons and correctional facilities and their inmate population, rather than the "formulation of any legislative policy or the adjudication of any particular claims of illegality." *See* Cal. Penal Code §§ 5002 and 5003.

Thus, since respondents have failed to articulate ***any*** important governmental interest that would support the gender based classification of the AAP, that portion of the AAP must be struck down as violative of the Equal Protection Clause of the Fourteenth Amendment.

II

RACIAL AND ETHNIC CLASSIFICATIONS THAT DO NOT FURTHER A COMPELLING GOVERNMENTAL INTEREST IN THE LEAST HARMFUL MANNER ARE PROHIBITED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

This Court has repeatedly held racial classifications to be "inherently suspect." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Such classifications are to be subjected to "strict scrutiny" (*Korematsu*, 323 U.S. at 216) and are valid only if use of the classification is necessary to further a compelling governmental interest (*Fullilove v. Klutznick*, ... U.S. ....., 48 U.S.L.W. 4979, 4992 4995 (opinion of Powell, J., concurring), 4999 (opinion of Stewart and Rehnquist, JJ., dissenting), 5007 (opinion of Stevens, J., dissenting) (1980); *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967)). This Court has, however, upheld racial classifications for remedial purposes when they are supported by legislative, judicial, or administrative findings of past constitutional or statutory violations. *Fullilove*, 48 U.S.L.W. at 4997-98 opinion of Burger, C.J., White and Powell, JJ.); see *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

This case, however, does not involve a remedial purpose. There were no legislative, judicial, or administrative findings of past discrimination by the Department. Rather, the racial and ethnic classification of the AAP are the sole product of the Department of Corrections. *Minnick*, 95 Cal. App. 3d at 513. Further, the Department neither

made findings of past discrimination nor produced any evidence of such discrimination. *Id.* at 513, 516. Indeed, it would not be within the power of the Department to make such findings. *Fullilove*, 48 U.S.L.W. at 4997-98 (opinion of Burger, C.J., White and Powell, JJ.); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.); Cal. Penal Code §§ 5002 and 5003. The only justification for the racial classification advanced by respondents was the improvement of relations with prisoners and reduction of racial tension. *Minnick*, 95 Cal. App. 3d at 514. Since the racial and ethnic quotas of the AAP were not enacted for a remedial purpose, amicus contends that the AAP should be subjected to the traditional test of strict and exacting scrutiny (*Loving*, 388 U.S. at 12), rather than the lesser standard suggested by the joint separate opinion of Justices Brennan, White, Marshall, and Blackmun in *Bakke* (428 U.S. at 324, 359).

The California Court of Appeal found, as did the trial court, that the Department of Corrections had indeed proffered a "'compelling state interest' in a safe and efficient correctional system." *Minnick*, 95 Cal. App. 3d at 521. With this conclusion amicus does not disagree. Amicus does question, however, whether the racial classifications are *necessary* to advance this interest. *Bakke*, 438 U.S. at 299, 305 (opinion of Powell, J.); *In re Griffiths*, 413 U.S. 717, 722 (1973); *Loving*, 388 U.S. at 11. Although the California court concluded that the use of racial classifications in the assignment, transfer, and promotion of correctional employees was necessary to attain the compelling interest of "safe" prisons, how the court arrived at this conclusion was not explained. *Minnick*, 95

Cal. App. 3d at 521. Unless the California Department of Corrections intends to pursue the constitutionally impermissible goal of operating a racially segregated prison system—assigning white correctional officers to guard white prisoners, black correctional officers to guard black prisoners, etc.—the race of the correctional officer cannot be considered "necessary" to reduce racial strife amongst the prisoners. The conclusion that the Department was indeed pursuing such an impermissible goal is supported by the fact that the AAP did not establish a general minority versus nonminority preference, but rather established different quotas for each racial and ethnic group. This makes it obvious that the motive behind the quota is not remediality but proportionality. Only the most naive could believe that the degree of discrimination against Department minority employees would be identical to the proportionality of that particular minority in the prison population. Thus, respondents have failed to demonstrate that their use of multiple, racial classifications in the promotion and transfer of correctional employees is necessary to advance the proffered governmental interest.

Beyond the generalized constitutional issues raised when a government grants or withholds privileges based on gender, race, or ethnic background, the AAP raises questions concerning the manner in which the classification is made. The AAP establishes two different quota bases: the gender based quota is based on the percentage of females in the California labor market, whereas the racial and ethnic quotas are based on the racial and ethnic makeup of the prison population.

Because the percentage of women in the prison population is very small, it becomes apparent that this split level quota system is intended not to be remedial but rather to maximize the employment preference for the preferred groups, women and minorities. The Department has failed to carry its burden for justification of using two separate yardsticks for measuring employment of women and minorities. The preferences therefore, must be stricken as nonremedial and discriminatory.

CONCLUSION

The California Department of Corrections has adopted a program where less qualified candidates are promoted before better qualified candidates solely because of skin color, ethnic background, or gender. This program was not adopted to remedy past discrimination nor is it necessary to promote a compelling state interest. Thus, whether the AAP is subjected to the "strict scrutiny" test (*see Bakke,* 438 U.S. at 305 (opinion of Powell, J.)) or the remedial purpose test (*see Bakke,* 438 U.S. at 359 (opinion of Brennan, White, Marshall, and Blackmun, J.J.)) for racial classifications or the "important governmental objectives" test for gender based classifications (*see Webster,* 430 U.S. at 316-17), it must be found to be constitutionally impermissible.

In dissenting from the judgment of this Court in *Fullilove,* Justices Stewart and Rehnquist stated:

> "The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible inter-

> est to government. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100, quoted in *Loving v. Virginia*, *supra*, 388 U.S. at 11. [Footnote omitted.] In short, racial discrimination is by definition invidious discrimination." *Fullilove*, 48 U.S.L.W. at 5000 (opinion of Stewart and Rehnquist, JJ., dissenting).

Amicus curiae Pacific Legal Foundation is concerned with the renewed government imposed racial and gender based discrimination. The fact that the race or gender discriminated against has changed should have no constitutional significance. The century old promise of "equal protection of the laws" will remain unfulfilled until that promise applies to all citizens equally as required by the Fourteenth Amendment to the United States Constitution.

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August, 1980

Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1213

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ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the decision of the California Court of Appeal is a final judgment or decree subject to review in this Court under 28 U.S.C. 1257(3).

2. Whether state courts have jurisdiction over actions brought under Title VII of the Civil Rights Act of 1964.

3. Whether the California Court of Appeal properly reversed the state trial court's injunction barring respondents from considering race, national origin,* or sex in their hiring and promotion decisions under any circumstances.

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* In the interest of brevity, we will use the term "race" to include "national origin."

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INTEREST OF AMICI CURIAE

Petitioners challenge, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, and the Fourteenth Amendment to the Constitution, an affirmative action program implemented by respondent California Department of Corrections. The Equal Employment Opportunity Commission has responsibility to administer, interpret, and enforce Title VII of the Civil Rights Act. 42 U.S.C. 2000e-4 and 5. The Attorney General has enforcement responsibility under Title VII when the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1).

Moreover, respondent California Department of Corrections has received funds under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. 3701 *et seq.*, which is administered by the Law Enforcement Assistance Administration (LEAA). The nondiscrimination provisions of that Act and implementing LEAA regulations are of some relevance in this case.

STATEMENT

Petitioners contend that respondents, acting pursuant to an Affirmative Action Program adopted in 1974 (Exh. G) and revised in 1975 (Exh. R), impermissibly discriminate on the basis of race and sex by giving preferences to women and minorities in hiring and promotions. The written Program says nothing about how, or even whether, race or sex may be taken into account in individual hiring or promotion decisions.[1] It describes other measures to be taken to fulfill the policy of equal employment opportunity —*e.g.*, undertaking aggressive recruiting measures directed to women and minorities (Exh. R at 15, 22-24);

[1] The Program, as revised in 1975, provides that each institution and parole region was to develop an affirmative action plan "directed toward actively seeking out minorities and women and encouraging job retention by creating a realistic climate for equal opportunity in the Department of Corrections. The plan must give priority *consideration* to minorities and women in all hiring and promotional practices" (Exh. R at 6; emphasis added). The Program does not, however, direct that any preference be given.

working with the State Personnel Board to ensure that qualifications are job-related (*id.* at 14, 24, 32); providing job-related training to all employees, with special focus on minorities and women (*id.* at 34-35); and training all employees in equal employment opportunity matters (*id.* at 36-38). Petitioners do not challenge these aspects of the Program (Pet. Br. 38; Pet. App. F-4) which, at all events, appear to be required by LEAA regulations. 28 C.F.R. 42.301 *et seq.* However, petitioners do contend that officials of the Department, *motivated* by the aims of the written Program, impermissibly give preference to women and minorities in individual hiring and promotion decisions.

At trial, officials of the Department testified that it is the Department's policy to hire and promote only the most qualified applicants (R.T. 194, 203-206, 333-334, 383, 452-453, 483, 487-488, 548, 563-564, 591, 666, 668, 672, 773, 777-778, 792, 882). However, the officials, in response to hypothetical questions about how that policy was to be implemented, testified that the fact that an applicant is a minority or woman is a consideration that would be taken into account, along with other factors, in determining applicants' qualifications for positions where there is an underrepresentation of women or minorities (R.T. 227-228, 284, 309, 372-374, 382-383, 453-454, 498-499, 600, 793). The effect was described to be that if competing applicants were reasonably equally qualified, the minority individual or woman would get the position (R.T. 289, 601). No fixed percentage of positions was reserved for women and minorities (Pet. App. A-7, A-16), nor was there an official policy of setting positions aside for them, except where female or male-only certifications were obtained because sex was a bona fide occupational qualification.[2]

[2] The Court of Appeal did note (Pet. App. A-7) that some positions were designated for one sex. Designations of positions by sex may, of course, be justified under Title VII and the Fourteenth Amendment where sex is a bona fide occupational qualification. *Dothard* v. *Rawlinson*, 433 U.S. 321, 332-337 & n.20 (1977). No assessment of the particular positions affected is available on the present record.

There were also certain instances in which positions were identified as being reserved for minorities. But, as respondents point out

The evidence did not show, and the state courts did not determine, what weight was given to race or sex in any particular instance when it actually was taken into account. Indeed, petitioners did not establish and the trial court did not find *any* specific occasion in which a lesser qualified minority or female applicant was selected over a more qualified white or male. Nor did the Court of Appeal identify any such specific instance. The Court of Appeal noted (Pet. App. A-6 to A-7) only that, although the qualifications of non-minorities and males "are still 'weighed fairly and competitively'" (Pet. App. A-16, quoting *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 317-318 (1978) (Powell, J.)), "[s]ome evidence supported the inference that this 'plus' [given to minorities and women] has occasionally contributed" to the promotion of a minority or woman ahead of a more qualified applicant. The court found no evidence, however, of any specific instance in which a preference was given in initial hiring (see also note 5, *infra*).[3] On this record, then, petitioners' challenge to respondents' employment practices is a challenge only to the Department's promotional practices on their face.[4]

(Resp. Br. 8), responsible Department officials testified that this was never the Department's policy and that when such incidents were brought to the attention of supervisors they were promptly corrected. Neither the trial court nor the Court of Appeal made any finding that those corrective measures were inadequate.

[3] Even with the Department's affirmative action efforts, non-minorities and males continued (in the period reflected in the record thus far) to receive a large portion of the promotions in the Department. In 1975, whites received 72% of the promotions to the higher ranking security positions, Correctional Program Supervisor II and III (Exh. D). In that year, males received 94% of the promotions to these positions (*ibid*). Whites received 70% of the Department-wide promotions in 1976 (R.T. 679).

[4] Thus, petitioners do not challenge an application of the policy to any particular employment decision—*e.g.*, on the ground that the factor of race or sex was given too much weight, that a female or

Respondents contend (Resp. Br. 26-28, 34-43) that this policy permitting preferences in particular cases furthers a compelling interest in remedying the effects of past discrimination by the Department. They also contend (*id.* at 28-33, 43-50) that the policy furthers the compelling state interest in promoting prison security and fostering inmate rehabilitation. The trial court made no finding whether either of these purposes was supported by the evidence. Indeed, the trial court viewed the purpose to be furthered by the plan—and whether past discrimination existed—to be irrelevant (Pet. App. A-22 to A-23; 5/5/77 Tr. 132; 4/14/77 Tr. 20; R.T. 344). It was the trial court's conclusion, apparently based on the California Supreme Court's decision in *Bakke* v. *Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), that respondents were prohibited from giving consideration to race, sex, or national origin in individual hiring and promotion decisions under *any* circumstances, and it enjoined them from doing so (Pet. App. D-2, F-4, G-2).

On appeal, the California Court of Appeal concluded that under this Court's decision in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), which was decided after the trial court's decision, the Fourteenth Amendment does not preclude consideration of race or sex where necessary to further a compelling state interest (Pet. App. A-14 to A-15). The Court of Appeal therefore reversed the Superior Court's injunction barring consideration of race or sex under any circumstances. Like the trial court, the Court of Appeal did not consider whether the Department's promotions policies could be supported as a means to remedy past discrimination by the Department; it left this issue open for consideration on remand (Pet. App. A-23). But the Court of Appeal

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minority individual who was not qualified nevertheless was appointed, or that race or sex was taken into account in selecting employees for positions in which minorities or women were not underrepresented. Compare *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 28-29, 34-35 (opinion of Burger, C.J.). Indeed, the only individual petitioners in this case, Minnick and Darden, were found not to have been qualified for promotion to the positions they sought (Pet. App. A-9, A-23).

did conclude that those practices could be supported by California's compelling interest in the proper management of its correctional system (Pet. App. A-17). Even this issue, however, was left open for further examination on retrial. See point I, *infra*.

SUMMARY OF ARGUMENT

I.

A. The Court of Appeal's decision is not a final judgment or decree subject to review under 28 U.S.C. 1257(3). Under California law, an appellate decision reversing a trial court judgment remands the case for a new trial as if a judgment had never been entered, unless the appellate court indicates a contrary intention. Here, the Court of Appeal's decision plainly contemplates a retrial. This case does not fall into any exceptions to the final judgment rule, because the new trial will be on the very federal questions petitioners raise in this Court, and many factual issues bearing on these questions remain to be explored.

B. The Court of Appeal held that respondents' practices do not violate Title VII of the Civil Rights Act of 1964. In our view, however, jurisdiction of Title VII claims is exclusively in the federal courts. Section 706 of the Act provides that federal district courts "shall have jurisdiction" of such cases, and the structure of the Act is indicative of a legislative intent that this jurisdiction would be exclusive, as a supplement to available state remedies. The legislative history of Title VII and decisions of this Court reinforce this conclusion.

II.

If the Court reaches the merits, it should affirm the judgment of the California Court of Appeal, which reversed the trial court's injunction barring respondents from considering the race or sex of an applicant under *any* circumstances.

A. The Fourteenth Amendment does not bar a state agency from giving limited, class-based preferential treatment to qualified women or minorities in order to remedy the effects of its own prior discrimination. Indeed, the Con-

stitution *requires* consideration of race to remedy the present effects of past discrimination, and a state may do so even where there has been no judicial determination of past discrimination. When Congress extended Title VII to state and local governments in 1972, it found that racial discrimination by these entities has a particularly deleterious effect because it promotes ignorance of minority problems on the part of government officials and creates distrust of the government by minorities.

A state agency ordinarily is the appropriate authority to remedy its own past discrimination. It has access to all relevant information and has the expertise to identify and analyze its previous practices to determine if they were the result of discrimination, subtle or overt. A state agency's remedying of its own discrimination is also consistent with the policy reflected in Title VII of deferring to the states and localities in remedying employment discrimination. In fashioning an appropriate remedial program, the agency is not confined to identifying particular instances of discrimination and affording individualized relief on a case-by-case basis. In order to undo the impact on society at large of its employment discrimination, it is especially appropriate for a state agency to adopt measures designed to increase minority representation on the work force to the level that would have obtained in the absence of discrimination.

Moreover, Title VII is to serve as a catalyst to cause employers to self-evaluate their employment practices and to endeavor to eliminate discrimination. As we explained in our brief in *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), if this self-evaluation discloses a sound basis on which it reasonably could be concluded that the employer has violated Title VII, it may voluntarily undertake measures to remedy that violation. A governmental agency should not be held to *violate* the Fourteenth Amendment if it reasonably and in good faith takes measures to comply with a statute enacted by Congress to *enforce* that Amendment.

B. Respondents' alternative justification for its employment practices—that they promote prison security and

inmate rehabilitation—creates a significant potential for involving the government in reinforcing racial stereotypes. It could be supported only by the most compelling circumstances, which have not been demonstrated on the record. The Court need not reach this question, however. The preferable course in a case such as this is first to determine what measures are appropriate to remedy prior discrimination, for which some class-based, race-conscious relief is permissible. Only then should the court consider what, if any, additional measures are justified by the employer's operational needs. The trial court may follow this course on remand.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE DECISION BELOW IS NOT A FINAL JUDGMENT OR DECREE REVIEWABLE UNDER 28 U.S.C. 1257(3)

Under California law, an appellate decision reversing a trial court judgment vacates the judgment and returns the case for a new trial "as if no judgment had ever been rendered." See *Salaman* v. *Bolt*, 74 Cal. App. 3d 907, 914, 141 Cal. Rptr. 841, 844 (1977), and cases cited. Because a reversal "places the parties in the same position as if the case had never been tried," the losing party in the appellate court is free on retrial to introduce additional evidence in support of its claims. See *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 547 (1947), quoting *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d 547, 549 (1936). The only exceptions to this rule are where the appellate court clearly does not intend a new trial, see, *e.g.*, *Stromer* v. *Browning*, 268 Cal. App. 2d 513, 518-519, 74 Cal. Rptr. 155, 158 (1968), or where the appellate court finally resolves a dispositive legal issue which does not turn upon facts which might change at a new trial. 268 Cal. App. 2d at 520; 74 Cal. Rptr. at 160; *People* v. *Shuey*, 13 Cal. 3d 835, 842, 533 P.2d 211, 216, 120 Cal. Rptr. 83, 88 (1975).

In the present case, the Court of Appeal plainly did not intend to foreclose a new trial or determine an issue in a manner that would be unaffected by the introduction

of new evidence. To the contrary, the court expressly observed that it need not consider the relevance of respondents' evidence of prior discrimination or the validity of another of the trial court's findings because both questions would be determined "[i]f the case is to be retried" (Pet. App. A-23). The Court of Appeal also observed that questions of jurisdiction and standing would "require examination if the case is to be retried" (Pet. App. A-24). In these circumstances, this Court's decision in *Gospel Army* v. *Los Angeles, supra,* compels the conclusion that the Court of Appeal's decision is not a final judgment or decree under 28 U.S.C. 1257.

The Court has carved out certain exceptions to the finality requirement where the highest court of a State "has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477 (1975). But the exceptions to the finality rule discussed in *Cox* apply in situations in which the further proceedings in state court are on *nonfederal* issues. *Id.* at 477-487. Here, the further proceedings in state court would be on the very *federal* issues that petitioners seek to have reviewed by this Court—whether, and to what extent, the Department's practices are inconsistent with the Fourteenth Amendment and Title VII. The Court of Appeal hardly can be thought to have "finally determined" these federal questions when it has given petitioners the opportunity to retry them, subject to further appellate review in the state courts.

It is true that the Court of Appeal held, on the basis of the record before it, that the Department's practice of considering race or sex as one factor in assessing qualifications was not invalid on its face, in view of what is perceived to be the Department's compelling interest in the proper management of the correctional system. This ruling on the legal principle will govern further proceedings in the trial court, but will remain subject to review by this Court after a final judgment is rendered by the state courts. And the parties will be free on retrial to introduce additional evidence.

Moreover, the principal question in this case is whether petitioners are entitled to *injunctive* relief (Pet. App. A-9 & n.4, G). The trial took place more than four years ago, and concerned incidents that occurred early in the Program's implementation. The new trial contemplated by the Court of Appeal presumably would be concerned with whether petitioners are *now* entitled to injunctive relief, in light of experience under the Program, changed circumstances, and intervening developments in the law, including the decisions in *Bakke* and *Weber*, *supra*, and *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980). For example, respondents' new Affirmative Action Program, adopted in 1979, could be taken into account, and the passage of time may have resulted in substantial changes in the composition of the work force and the Department's security requirements, affecting the Department's purported need to consider race or sex for operational purposes. Accordingly, even as to the asserted operational needs justification, "[w]e cannot assume that the [Court of Appeal] would hold the [practices] in question constitutional no matter what facts might be presented upon a second trial. Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation." *Gospel Army* v. *Los Angeles*, *supra*, 331 U.S. at 548.

Finally, the Court of Appeal left open for consideration on remand whether respondents' practices are justified to remedy past discrimination by the Department; accordingly the decision of the Court of Appeal plainly is not final on that question. Because the prior discrimination issue remains unresolved, the decision of the Court of Appeal on the operational needs issue does not fall into the exceptions to the final judgment rule discussed in *Cox Broadcasting Corp.* v. *Cohn*, *supra*, for the additional reason that further proceedings in the trial court would "require the decision of other federal questions [*i.e.*, the prior discrimination issue] that might also require review by the Court at a later date * * *." 420 U.S. at 477.

Because the decision below is not a final judgment or decree, the Court is without jurisdiction to review the case at this time. Therefore, the writ of certiorari should

be dismissed. Even if the Court were to conclude that it has jurisdiction under 28 U.S.C. 1257(3), the Court may wish to consider dismissing the writ as improvidently granted because of a number of other features of the case, set forth in the margin, that may not have been apparent when the petition for a writ of certiorari was granted.[5]

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[5] (1) If the Court were to find the decision below "final", it could only be in the sense that the Court of Appeal finally rejected the trial court's holding that the state's consideration of race, sex, or national origin would be impermissible under *any* circumstances. That narrow question does not warrant review at this time in light of this Court's decision in *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 272.

(2) The Court of Appeal perceived problems with petitioners' standing and the state court's jurisdiction that it concluded would "require examination if the case is to be retried" (Pet. App. A-23 to A-24). If it should turn out that the state court does not have jurisdiction or petitioners do not have standing under state law, this may be an adequate independent state ground supporting the judgment of the Court of Appeal. *Philadelphia Newspaper, Inc.* v. *Jerome,* 434 U.S. 241 (1978); *California* v. *Krivda,* 409 U.S. 33 (1972). Further review of petitioners' standing under state law might also shed some light on whether petitioners have properly invoked this Court's Article III jurisdiction, in view of their failure to establish injury to any specific individual employee and uncertainty respecting the likelihood of future injury. See *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539-546 (1976); *Doremus* v. *Board of Education,* 342 U.S. 429, 434 (1952); *Bateman* v. *Arizona,* 429 U.S. 1302, 1305 (1976) (Rehnquist, J.).

(3) The Court of Appeal reversed the trial court's apparent finding (Pet. App. F-4, F-7, E-2) that the Department granted preferences to minorities and women in its *hiring* practices, holding (Pet. App. A-7 to A-8) that "[t]here was no substantial evidence of any instance in which [such preference] had been exercised in the 'initial hiring' of a new employee." See also Pet. App. A-17. Moreover, although petitioners Darden and Minnick (but not CCOA) sought to represent a class that would have included applicants for employment (First Amended Complaint, at 2), the Superior Court declined to certify the case as a class action (Pet. App. A-23). As a result, claims of discrimination in initial hiring are not properly before the Court. Cf. *General Telephone Co.* v. *EEOC,* No. 79-488 (May 12, 1980), slip op. 12; *East Texas Motor Freight* v. *Rodriguez,* 431 U.S. 395, 403 (1977). Questions 1, 2 and 3 presented by petitioners (Pet. Br. i) must therefore be limited to *promotions.* For similar reasons, Questions 4 and 5 (*ibid.*), which challenge the validity of the five-year goals for employment of minorities and

II. THE QUESTION WHETHER RESPONDENTS' AFFIRMATIVE ACTION PROGRAM VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 IS NOT PROPERLY PRESENTED BECAUSE STATE COURTS DO NOT HAVE JURISDICTION OF ACTIONS UNDER TITLE VII

The Superior Court held (Pet. App. E-2, F-7) that respondents' employment practices violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*). The Court of Appeal reversed that portion of the judgment, finding no violation of Title VII (Pet. App. B-2). In our view, however, federal court jurisdiction of Title VII cases is exclusive [6] and the California courts were therefore without jurisdiction to entertain petitioners' Title VII claims.

Ordinarily state courts may enforce rights created by federal law. Indeed, this Court has indicated that concurrent jurisdiction "might be presumed" unless Congress provides to the contrary. See *California* v. *Arizona*, 440 U.S. 59, 66-68 (1979). See generally M. Redish & S. Muench, *Adjudication of Federal Causes of Action in State Court*, 76 Mich. L. Rev. 311, 313-325 (1976). Thus, as this Court recently stated in *Martinez* v. *California*, 444 U.S. 277 (1980), with respect to 42 U.S.C. 1983, "[where] 'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a

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women, are not properly presented for review. The Court of Appeal, after reviewing the Affirmative Action Program, concluded (Pet. App. A-6) that these goals were "directed to the hiring of new female and minority employees," not promotion of existing employees.

[6] Two courts of appeals have declined to reach the question where it arose tangentially. *Fox* v. *Eaton Corp.*, 615 F.2d 716, 719 n.7 (6th Cir. 1980), petition for cert. pending, No. 79-1856; *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1083-1084 & nn.4, 5 (8th Cir.), cert. denied, No. 79-1566 (May 27, 1980). The few federal district courts and state courts that have considered the question are divided. See cases cited in *Fox* v. *Eaton Corp.*, *supra*, 615 F.2d at 719; see also *Peterson* v. *Eastern Airlines*, 20 Fair Empl. Prac. Cas. 1322 (W.D. Tex. 1979) (finding concurrent jurisdiction).

State court.' " 444 U.S. at 283 n.7, quoting *Testa* v. *Katt*, 330 U.S. 386, 391 (1947), and *Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876).

In the case of Title VII, however, Congress *has*, in considerable detail, "specif[ied] a remedy for its enforcement." Section 706, 42 U.S.C. 2000e-5. The person aggrieved first must file a charge with a federal administrative agency, the EEOC. Section 706(b). If the EEOC cannot resolve the controversy through conciliation, the person aggrieved, the EEOC, or the Attorney General may bring a civil action. Section 706(f)(1). Section 706(f)(3) then provides that each United States district court "shall have jurisdiction" of actions brought under Title VII. Although the language of subsection (f)(3) does not, in so many words, provide that this jurisdiction is exclusive, Congress' intent that it be so appears from the numerous provisions in Section 706 that assume that the action will be brought in federal court. For example, Section 706(f)(4) provides for the chief judge of the district or the circuit to ensure expedited consideration of the case, and Section 706(f)(5) provides for appointment of a master under Fed. R. Civ. P. 53. Section 706(f)(2) states that the granting of temporary or preliminary relief shall be governed by Fed. R. Civ. P. 65. And, finally, Subsection (j) provides that "[a]ny civil action" brought under Section 706 "shall be subject to appeal" as provided in 28 U.S.C. 1291 and 1292, which govern appeals in federal courts. These provisions are inconsistent with the notion that Title VII cases can be brought in state court.

Nor was Congress silent regarding the role of the states in guaranteeing equal employment opportunity. Section 706(b) provides that where state or local law prohibits the alleged discriminatory practices and permits a state or local authority to grant or seek relief, no charge may be filed with the EEOC for 60 days after proceedings were "commenced under the State or local law." Congress' express provision for state agencies and courts to play a role in securing fair employment practices only "under * * * State or local law" suggests that they have no role in enforcing the parallel federal law, Title VII. Thus, as the Court stated

last Term in *New York Gaslight Club, Inc.* v. *Carey*, No. 79-192 (June 9, 1980) (slip op. 10; emphasis added), "[i]t is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in *federal court* as supplements to available *state* remedies for employment discrimination." Indeed, this Court has often assumed, apparently without deciding, that it is the federal courts that have enforcement authority under Title VII. See *id.* at 9, 11 & n.6, 12; *General Telephone Co.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 13; *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 360, 361, 364, 366, 367, 368, 370 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974); *Love* v. *Pullman Co.*, 404 U.S. 522, 523 (1972).[7]

As amicus AFL-CIO points out (Br. 13-16), the legislative history of the Civil Rights Act of 1964 and the

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[7] This case differs substantially from *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), in which the Court held that Section 301(a) of the Labor Management Relations Act, which provides that federal district courts "may" hear suits for violation of collective bargaining agreements, did not *divest* state courts of their *preexisting* authority to entertain suits for breach of contracts. Here, Section 706(f)(3) provides that district courts "shall" have jurisdiction, not that suits "may" be brought there (*Dowd Box Co.* v. *Courtney*, *supra*, 368 U.S. at 506; compare *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 559 (1963)).

Moreover, in *Dowd Box*, the Court emphasized that state courts had traditionally exercised jurisdiction over breach of contract actions (368 U.S. at 508); that the legislative history demonstrated that Congress merely intended to expand the availability of forums in which such actions could be brought (*id.* at 508-514); that Congress had rejected proposals to invoke a federal administrative process to resolve such disputes (*id.* at 513); and that the federal law to be applied would often adopt state law (*id.* at 506-507). In contrast, exclusive federal jurisdiction under Title VII would not *divest* state courts of preexisting jurisdiction over employment discrimination claims; remedies under state law, to the extent they exist, are expressly preserved. Congress created in Title VII a new and distinct federal right (not within the traditional scope of state court jurisdiction) and provided for its enforcement by a federal administrative agency. There is also no occasion under Title VII to adopt as the rule of decision provisions of state law with which state courts might be more familiar.

1972 amendments to Title VII also confirm that civil actions would be brought in federal court. For example, the House report on the 1972 amendments states that the person aggrieved "shall * * * have the right to commence an action * * * in the proper United States district court." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 12 (1971); see also S. Rep. No. 92-415, 92d Cong., 1st Sess. 23 (1971) ("in the appropriate U.S. district court").

State court jurisdiction to enforce Title VII would also create a significant potential for frustrating Title VII's purpose of encouraging resolution of discrimination complaints through resort to state proceedings and conciliation by the EEOC. While the application of the common law rules of preclusion to Title VII claims is not clear (compare *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 49 n.10, with *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir.), cert. denied, 444 U.S. 983 (1979)), if the person aggrieved could have, but did not, join his Title VII claim with his state law claim in state court, he might be barred by principles of res judicata from later bringing a Title VII action in federal court. This possibility might deter full pursuit of remedies under state law. See *New York Gaslight Club, Inc.* v. *Carey*, *supra*, slip op. 11 n.6. Moreover, in order to preserve his right to a federal forum, a person whose federal charge is still pending before the EEOC when he seeks relief in state court might feel constrained to short-circuit EEOC conciliation efforts and file a protective action in federal district court in order to prevent the res judicata bar. Cf. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).[8]

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[8] Since Title VII was enacted in 1964, the approximately 100 federal district courts have developed considerable expertise in handling the complex facts, sensitive legal and equitable issues, and technical procedural problems that frequently arise in these cases. When trial of these cases is confined to the federal district courts, as it has been to date, the federal courts of appeals are available to apply their considerable expertise and thereby to perform an essential screening function for this Court. In many cases, resolution of the issues presented requires reliance on substantive Title VII law, federal rules of procedure, and the exercise of the Court's

For these reasons, we submit that, while the question is not without difficulty, the California courts were without jurisdiction to consider petitioners' Title VII claims.[9] Accordingly, if the writ of certiorari is not dismissed, the portion of the Court of Appeal's judgment pertaining to Title VII should be vacated with instructions to dismiss the complaint in pertinent part.

III. THE COURT OF APPEAL PROPERLY REVERSED THE TRIAL COURT'S INJUNCTION PROHIBITING RESPONDENTS, UNDER ANY CIRCUMSTANCES, FROM TAKING RACE OR SEX INTO ACCOUNT IN PARTICULAR EMPLOYMENT DECISIONS

We agree with the Court of Appeal that, under this Court's decision in *Bakke*, the Fourteenth Amendment does not bar a public entity from taking race or sex into account under *all* circumstances. 438 U.S. at 272. As we explain below, a state agency may institute programs that utilize such classifications where the program is tailored in purpose and effect to remedy prior discrimination. Respondents have sought to defend the employment practices chal-

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supervisory power. See, *e.g.*, *General Telephone Co.* v. *EEOC*, *supra*, slip op. 10-12; *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 403-406 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-425 & n.14 (1975). Resort to some of these sources of guidance may be foreclosed in review of cases coming from state courts.

[9] Early versions of the EEOC's regulations pertaining to right-to-sue letters stated that the person aggrieved would be notified of his "right to sue in a Federal District Court." See 29 C.F.R. 1601.25b(a) (1971), as added, 35 Fed. Reg. 10006 (1970); 29 C.F.R. 1601.25c(a) (1973), as added, 37 Fed. Reg. 9219 (1972). Presumably for this reason, the right-to-sue letters issued to petitioners Minnick and Darden in this case informed them of their right to sue "in the appropriate United States District Court" (Exhs. 39, 40). The reference to federal district court was deleted when EEOC's regulations were revised in 1977. See 29 C.F.R. 1601.28 (1979), as added, 42 Fed. Reg. 55393 (1977). See also *Peterson* v. *Eastern Airlines*, 20 Fair Empl. Prac. Cas. 1322 (W.D. Tex. 1979) (EEOC, as amicus curiae, urges concurrent jurisdiction). On reexamination, however, we believe that the interpretation suggested in the earlier EEOC regulations is correct.

lenged here on the ground that they are necessary to remedy the effects of past discrimination, and this question remains open for consideration on remand to the trial court. Therefore, if the Court reaches the merits, the judgment of the Court of Appeal, which reversed the trial court's injunction prohibiting consideration of a candidate's race or sex under any circumstances and remanded for a new trial, should be affirmed.

A. The Fourteenth Amendment Does Not Prohibit A State Agency From Remedying The Effects Of Its Past Discrimination By Voluntarily Adopting An Affirmative Action Plan That Permits Race Or Sex To Be Considered As A Factor In Selecting Employees For Positions That Reasonably Appear To Have Been Affected By Such Discrimination

This Court has recognized that remedying racial discrimination and preventing its effects from being carried forward serves such an important public purpose that a public entity may utilize racial classifications to achieve that end. See *Fullilove* v. *Klutznick, supra*; *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 307 (Powell, J.); *id.* at 325, (Brennan, Marshall, White, and Blackmun, JJ.). Indeed, when a state entity has engaged in discrimination, the Constitution requires the consideration of race where necessary to eliminate the present effects of that discrimination. See *Green* v. *County School Board*, 391 U.S. 430 (1968). This duty arises wherever discrimination has been practiced—in public schools, *e.g.*, *ibid.*; *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526 (1979); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); in voting, *e.g.*, *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); and in housing, *e.g.*, *Hills* v. *Gautreaux*, 425 U.S. 284, 297 (1976). A public entity which has discriminated in the past, or which is likely to be found to have so discriminated, may voluntarily take race-conscious measures to remedy the effects of its practices without violating the Fourteenth Amendment —even where there has been no finding of a constitutional violation by a court. See *McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (upholding a voluntary desegregation plan); *United Jewish Organizations* v. *Carey*, 430 U.S. 144

(1977). The same principles apply, in our view, where a state agency's employment practices have discriminated on the basis of race.[10]

Although the validity of respondents' practices under Title VII are not before the Court (see pages 11-15, *supra*), the statutory provisions in Title VII and the legislative background and purposes of its extension to state and local governments in the exercise of Congress' power to enforce the Fourteenth Amendment reinforce the conclusion that would have been reached as to the constitutional questions before the extension of Title VII. In our view, the Fourteenth Amendment does not prohibit a public employer from taking remedial measures that are consistent with this legislative background and purpose and are designed to ensure compliance with Title VII.

The importance of eliminating racial discrimination in state and local government employment was underscored by Congress when it extended Title VII to those governments in 1972. Pub. L. No. 92-261, Section 2, 86 Stat. 103. Congress found that "widespread discrimination against minorities exists in State and local government employment," and that this discrimination "is perpetuated by the presence of both institutional and overt discriminatory practices [, *e.g.*,] * * * through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities." H.R. Rep. No. 92-238, *supra*, at 17. Indeed, em-

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[10] Petitioners challenge respondents' promotions policy principally on the ground that it is based on impermissible *racial* classifications (Pet. Br. 21-32, 36, 38-40), although they also take issue with gender-based classifications (*e.g.*, Pet. Br. 33, 37-38, 40, 44-46). In our view, a state agency has at least as much flexibility to remedy discrimination on the basis of sex as it does where race is concerned. This Court has recognized that equal protection principles permit the use of gender-based classifications to remedy the " 'long-standing disparate treatment of women.' " *Califano* v. *Webster*, 430 U.S. 313, 317 (1977), quoting *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n.8 (1977). Where governmental practices have operated to limit employment opportunities for women, governmental programs designed to remedy these limitations serve constitutionally permissible objectives. See *Califano* v. *Webster*, *supra*; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

ployment discrimination by state and local government was found to be even "more pervasive than in the private sector" (*ibid.*). See also S. Rep. No. 92-415, *supra*, at 10; 118 Cong. Rec. 1816 (1972) (remarks of Sen. Williams).

Congress also recognized that the harm resulting from discrimination in government employment extends well beyond the loss of employment opportunities to individuals:

> This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

S. Rep. No. 92-415, *supra*, at 10; see also H.R. Rep. No. 92-238, *supra*, at 19; 118 Cong. Rec. 1816 (1972) (remarks of Sen. Williams). Congress found that employment discrimination was "particularly acute" and had "the most deleterious effect in [those] governmental activities which are most visible to the minority communities (notably education, *law enforcement, and the administration of justice*) with the result that the credibility of the government's claim to represent all the people equally is negated." H.R. Rep. No. 92-238, *supra*, at 17 (emphasis added).[11] Accord-

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[11] Similar concerns about the effect on minority communities of employment discrimination in law enforcement agencies were voiced when the non-discrimination provisions of the Omnibus Crime Control and Safe Streets Act were amended in 1973 and 1976. 119 Cong. Rec. 20070 (1973) (remarks of Rep. Jordan); 122 Cong. Rec. 34118 (1976) (remarks of Rep. Conyers).

ingly, Congress concluded that "governmental units should lead the way in providing equal opportunity." S. Rep. No. 92-415, *supra*, at 434; see also 118 Cong. Rec. 1816 (1972). Thus, although Congress did not *require* state agencies unilaterally to adopt race-conscious measures to remedy the effects of their own past discrimination, the legislative background of the 1972 amendments to Title VII [12] reinforces the conclusion that a state has a compelling interest in doing so.

Furthermore, a state or local agency ordinarily is the appropriate authority to remedy its own discrimination, as distinguished from that of society. Compare *Fullilove* v. *Klutznick*, *supra*, slip op. 3 (Powell, J.); *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 309-310 (Powell, J.).[13] The agency is in the best position and has the expertise to identify and analyze its previous practices and to determine if they were the result of discrimination, subtle or overt. Unlike a court, which is restricted to evidence adduced at a formal trial, the agency has access to all relevant information, including subjective motivations of its officials. Such initiatives are also consistent with the policy reflected in Title VII of de-

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[12] Congress' legislative findings regarding the effects of and need to remedy racial discrimination in state and local government, expressed in conjunction with the exercise of its power under Section 5 of the Fourteenth Amendment to enforce the equal protection guarantee of that Amendment, is due great weight. Cf. *Fullilove* v. *Klutznick*, *supra*, slip op. 24-27, 30-32 (Burger, C.J.); *id.* at 4-7, 13-15 (Powell, J.); *id.* at 4-5 (Marshall, J.); *City of Rome* v. *United States*, No. 78-1840 (Apr. 22, 1980), slip op. 15-24; *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 301-302 & nn.40, 41, 307-310 (Powell, J.); *id.* at 367-369, 373 (Brennan, White, Marshall & Blackmun, JJ.); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 175-178 (1977) (Brennan, J.); *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656 (1966).

[13] In the instant case, for example, the Department was explicitly instructed by the Governor to prepare an affirmative action plan, subject to continuing oversight by the State Personnel Board (see *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 308 (Powell, J.)), and the California legislature approved affirmative action efforts by the state agencies. See generally Resp. Br. 37-41.

ferring to the states and localities in remedying employment discrimination (*Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), slip op. 12-13)—a policy that applies with equal force where it is the state or locality that is alleged to have discriminated. See H.R. Rep. No. 92-238, *supra*, at 19.

For these purposes, a state agency is not confined merely to seeking to identify individual victims of past discriminatory decisions and, if it finds them, affording relief on a case-by-case basis. As Congress so plainly recognized when it extended Title VII to state and local governments (see pages 12-19, *supra*), the effects of employment discrimination in this setting extend well beyond the loss of employment opportunities by particular individuals. Such discrimination deprives the agency of the perspective of minority persons regarding the impact of its programs on minorities; it fosters distrust on the part of minorities of governmental functions carried out by personnel who are not representative of the community at large, thereby perhaps deterring minorities from full participation in government programs; and it sets a highly visible example of discrimination, or acquiescence in the results of past discrimination. In order to remedy these broader effects of discrimination, the agency may appropriately take measures designed to bring minority representation in its work force to the same percentage that obtains in the relevant labor market, and thereby to place the agency in the position it presumably would have been in had there been no discrimination. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 307 (1977), quoting *Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977).[14]

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[14] Adoption of such voluntary plans also comports with recommendations (contained in a report of the United States Commission on Civil Rights) on which Congress relied in extending Title VII to state and local governments. *For All the People—By All the People—A Report on Equal Employment Opportunity in State and Local Government Employment* (1969). See H.R. Rep. No. 92-238, *supra*, at 17-18; S. Rep. No. 92-415, *supra*, at 121-130; 118 Cong. Rec. 1816 (1972).

Although, as we have shown, Congress made legislative findings regarding the effects of racial discrimination in government employment, it of course did more than merely make findings. It extended to state and local governments the provisions of Title VII of the Civil Rights Act of 1964.[15] Title VII is to serve "as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *Steelworkers* v. *Weber*, *supra*, 443 U.S. at 204. As we explained in our brief in *Steelworkers* v. *Weber*, *supra* (at 35-53), if this

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[15] The overriding purpose of Title VII is to "break down old patterns of racial segregation and hierarchy" and "'to open employment opportunities for Negroes in occupations which have been traditionally closed to them'" (*Steelworkers* v. *Weber*, *supra*, 443 U.S. at 208, quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)). As this Court held in *Weber*, a voluntary affirmative action program adopted by an employer to give limited preference to qualified minorities to remedy traditional patterns of racial hierarchy and a manifest imbalance in its employment of minorities is permissible under Title VII. In view of the unique public responsibilities of a governmental entity and the legislative history of the 1972 amendments to Title VII (see pages 17-19, *supra*; *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 353-354 n.28 (Brennan, White, Marshall & Blackmun, JJ.)), it would be "ironic indeed" if the 1972 amendments to Title VII were read as a legislative *prohibition* against adoption by state and localities of race-conscious measures to undo traditional patterns of racial segregation and hierarchy. *Steelworkers* v. *Weber*, *supra*, 443 U.S. at 204. The holding in *Weber* therefore applies with particular force to state and local governments. Moreover, as this Court has recognized, Congress "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 335 n.14; accord *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). Therefore, if states are subject to greater restriction than private employers in the adoption of affirmative action plans, that restriction derives from the Fourteenth Amendment. For the reasons stated in the text, we believe the Fourteenth Amendment permits a state agency to take reasonable race-conscious measures to remedy its own prior discrimination.

good faith self-examination and self-evaluation create a sound basis on which it reasonably could be concluded that the employer has violated Title VII, he may voluntarily undertake remedial measures even in the absence of an independent finding of discrimination.[16] Such corrective action by the employer is consistent with the statutory scheme, under which "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [the] goal" of equal employment opportunity. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 44. Nothing in Title VII suggests that this policy of encouraging voluntary compliance applies with less force to state and local governments.[17] Accordingly, we submit that a state agency should not be held to *violate* the Fourteenth Amendment if it reasonably and in good faith takes race-conscious measures to remedy the effects of what could fairly be found to be a violation of a statutory provision (Title VII) enacted to *enforce* the Fourteenth Amendment. *United Jewish Organizations* v. *Carey*, *supra*. Because properly tailored race-conscious hiring or promotion are appropriate means of requiring employers to remedy their discrimina-

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[16] To require a state agency to go further before adopting race-conscious remedial measures, by conclusively proving its own prior discrimination in an independent forum or laying bare all the evidence of that discrimination, would be "self-defeating." *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 364 (Brennan, White, Marshall, & Blackmun, JJ.). As Mr. Justice Blackmun observed in his concurring opinion in *Weber*, if the employer were required to present concrete, nonstatistical evidence to establish specific instances of discrimination, he would pave the way for successful suits by the victims. 443 U.S. at 211. This could lead employers to eschew the voluntary measures Congress intended employers to take to come into compliance with Title VII. *Id.* at 210. In this case, for example, the Department did not offer much of its evidence of specific discrimination until after trial, in its motion to augment the record.

[17] When Congress extended Title VII to employees of state and local government in 1972, it endorsed the view that preferential remedial action may be necessary to redress past discrimination by defeating amendments designed to limit such remedies. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 353-354 n.28 (Brennan, White, Marshall, & Blackmun, JJ.).

tory conduct (see, *e.g.*, *Fullilove* v. *Klutznick*, *supra*, slip op. 19 (Powell, J.)), a state agency may undertake such measures voluntarily.[18] Indeed, an *obligation* to adopt affirmative measures to overcome the effects of its prior discrimination is made explicit in LEAA's regulations implementing the nondiscrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, which apply here. 28 C.F.R. 42.203(i).[19] See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 341-345 (Brennan, White, Marshall & Blackmun, JJ.). This regulation is

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[18] Petitioners maintain that affirmative action is not permissible where the agency concerned admitted only that its past actions had a discriminatory *impact* but did not admit that its practices were purposefully discriminatory. However, statistical evidence may establish a prima facie showing of purposeful discrimination in violation of Title VII and the Fourteenth Amendment (see note 21, *infra*). Thus, even if such a showing is a prerequisite to voluntary affirmative action by a public employer, this requirement may be met without an express admission.

In any event, petitioners' assumption that the Constitution prohibits affirmative measures designed to correct nonpurposeful discrimination is without merit. See *Fullilove* v. *Klutznick*, *supra*, slip. op. 27-28 (Burger, C.J.). In enforcing the Fourteenth Amendment, Congress may declare illegal actions which are not purposefully discriminatory in order to protect the rights guaranteed by the Fourteenth Amendment. See *ibid.*; *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966). Public entities may then act to ensure that they comply with Congress' enactments even when they have not purposefully discriminated. See *United Jewish Organizations* v. *Carey*, *supra*, 430 U.S. at 149-161; *Fullilove* v. *Klutznick*, *supra*, slip op. 27-28 (Burger, C.J.).

This Court's decision in *Dothard* v. *Rawlinson*, *supra*, forecloses petitioners' suggestion (Pet. Br. 34) that Title VII prohibits only purposeful discrimination by state and local governments. Under the cases, a discriminatory impact of a public employer's practices violates Title VII unless the employer rebuts the prima facie case by establishing a business necessity for the practices. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-580 (1978); *Hazelwood School District* v. *United States*, 433 U.S. 299, 311 n.17 (1977).

[19] Guidelines implementing Title VII also require such self-analysis and recommend affirmative measures to ensure compliance with Title VII. 44 Fed. Reg. 4422 (1979); 29 C.F.R. 1608.1. See also Policy Statement on Affirmative Action for State and Local Government Agencies. 41 Fed. Reg. 38814 (1976); 28 C.F.R. 50.14.

fully consistent with the intent of Congress. 122 Cong. Rec. 33880 (1976).[20]

The courts below did not consider whether the particular affirmative action plan at issue here was adopted for the purpose of remedying prior discrimination or whether there was a sound basis for believing that some remedial measures were necessary. These issues remain open for consideration on remand to the Superior Court. We therefore do not urge this Court to make the legal and factual findings necessary to sustain the Program, in whole or in part, on this ground. We note, however, that the record developed thus far indicates that the Program was instituted, at least in substantial part, to remedy prior discrimination and that there was a sound basis for believing that some remedial measures were necessary.[21] The fact

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[20] Senator Hruska, in commenting on the 1976 amendments to Section 518(b) of the Act, which bars LEAA from requiring the adopting of a percentage ratio or quota system, explained (122 Cong. Rec. 33880 (1976) (emphasis added):

> LEAA does have an affirmative obligation under this law to seek to eliminate discriminatory practices, *voluntarily*, if possible, prior to resorting to fund termination. *LEAA can request that a recipient eliminate the effect of past discrimination by requiring the recipient to commit itself to goals and timetables.* The formulation of goals is not a quota prohibited by section 518(b) of the act. A goal is a numerical objective fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available. Factors such as a lower attrition rate than expected, bona fide fiscal restraints, or a lack of qualified applicants would be acceptable reasons for not meeting a goal that has been established and no sanctions would accrue under the program.

See *United States* v. *City of Los Angeles*, 595 F.2d 1386 (9th Cir. 1979).

[21] The Affirmative Action Program indicates that the Department reviewed its own employment practices in order to identify their discriminatory aspects. See *Fullilove* v. *Klutznick*, *supra*, slip op. 3 (Powell, J.). The Department undertook an extensive statistical analysis of the composition of its own work force, finding underrepresentation of women and minorities in a number of areas (Exh. G at 21-38). As this Court has frequently noted, a disparate impact itself is often strong evidence of discrimination. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324, 339 & n.20

that the Department may also have considered its operational need for prison security and inmate rehabilitation (see *infra*, page 26) does not undercut the validity of the Program's remedial purpose.

Moreover, although the precise operation of the Program is not clear from the record and is open for examination on remand, certain of its features as they affect promotions, indicated on the record developed thus far, suggest that it is appropriately tailored to accomplish a remedial purpose.[22] *Fullilove* v. *Klutznick, supra*, slip op. 28, 33 (Burger, C.J.); *Califano* v. *Webster, supra*, 430 U.S. at 317. The Department's Program stigmatizes no group or individual.

(1977); *Village of Arlington Heights* v. *Metropolitan Housing Corp*, 429 U.S. 252, 266 (1977). The Department's commitment (Exh. R at 12-13, 24) to review job qualifications for their job-relatedness indicates, moreover, that it could not then justify any disparate impact on the basis of business necessity. The Program appears in other ways implicitly to acknowledge prior discrimination by the Department, noting the need (1) to develop staff sensitivity and commitment to equal employment opportunity; (2) to correct underepresentation of women and minorities; and (3) to develop upward mobility programs for women and minorities. Exh. R at 12-13, 24.

Moreover, as regards preferences given in *promotions*—the only issue in this case (see note 5, *supra*)—the Program specifically noted a need to correct underrepresentation of women and minorities at supervisory and management levels. The statistical analysis showed that as of September 1973, minorities held only 16.3% of the administrative positions and 10.9% of the higher ranking security positions in the Department, as compared with 23.7% minorities in the California labor market and 26% in the entry-level security positions (Exh. G. at 26, 33-34). Similarly, women held only 8% of the Department's non-clerical positions (*id.* at 22), although they comprised 38% of the California labor force. While 5.9% of the entry level correctional officers were female, women held only 3.6% of the higher level security positions (*id.* at 36). The record shows that women were not allowed to hold security positions in the eleven all-male prisons until 1972 (R.T. 73, 211, 442). Other testimony at trial also reflected a purpose to remedy prior discrimination (*e.g.*, R.T. 338, 344, 706).

[22] While this plan does not involve set-asides, this Court has held that remedial set-aside are lawful under some circumstances. See *Steelworkers* v. *Weber, supra; Fullilove* v. *Klutznick, supra.*

Minority or female status is only a "plus" or a factor to be taken into account, and only in those instances where statistics indicate that minorities and women are underrepresented. Once this underutilization is cured in a particular category, all individuals presumably would be considered on an equal basis.

The Program also has a limited impact on nonminorities and men. No white or male is required to relinquish a previously obtained promotion, and no white or male is foreclosed from consideration for any position. Rather, the Department's plan is very similar to the Harvard plan approved by this Court in *Bakke*. 438 U.S. at 316-319 (Powell, J.); *id.* at 326 n.1 (Brennan, White, Marshall & Blackmun, JJ.). It is (*id.* at 317-318 (Powell, J.)):

> flexible enough to consider all * * * qualifications of each applicant [including whether promoting the applicant would further remedial goals,] and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to [minority or female status] may vary from [position to position] depending upon the [level of underrepresentation] and the [ability of the] applicants for the [position].

B. The Court Should Not Reach The Operational Needs Justification

Respondents also have sought to defend their employment practices under the Affirmative Action Program as they affect minorities on the ground that they further the state's compelling interests in promoting prison security and fostering inmate rehabilitation (Resp. Br. 43-50).[23] In our

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[23] Respondents contend (Resp. Br. 43-45), for example, that increasing the minority composition of the correctional workforce at all levels is essential to ameliorate racial tension and the threat of racial violence. This is so, they maintain (Resp. Br. 46-48), because there is in general greater cultural identification between inmates and officers of the same race, which can lead to better communications and reduced tension. Minority guards also can serve as a vehicle for the airing of grievances to the prison administration. Respondents also contend (Resp. Br. 48-50) that integration of minority members throughout the correctional work

view, this asserted justification for respondents' policies largely overlaps with, and therefore cannot be considered separately from, respondents' argument that their policies are appropriate remedial measures for prior discrimination by the Department. If there has been a history of racial discrimination in the Department's past employment practices, then the racial tension, barriers to communication, and lack of sensitivity to minority problems that respondents describe may have been attributable in large part to that discrimination. As explained above, Congress recognized that employment discrimination by the government (and particularly by law enforcement agencies) is particularly deleterious because it creates hostility and distrust on the part of the minority community and fosters ignorance among responsible government officials regarding minority problems. See pages 18-19, *supra*. It is precisely for this reason that it is particularly appropriate for a state agency to take affirmative action to increase minority representation to the level that would have obtained in the absence of discrimination. Thus, an affirmative action plan incorporating race-conscious measures to remedy prior discrimination would be calculated to address the very effects of racial discrimination that respondents identify. And, indeed, many of the arguments respondents advance (see note 23, *supra*) only go to the need for the *presence* of minority staff, not any particular percentage of minorities (see note 25, *infra*).

The use of race-conscious selection techniques is far more troubling, however, when supported solely by an assertion that government could perform more effectively

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force fosters inmate rehabilitation, because minority officers provide role models for minority inmates and their presence serves to demonstrate that those in authority understand their concerns and will treat them fairly. Amicus City of Detroit also contends (Br. 26-50) that greater minority representation is necessary because racial discrimination practiced against minority inmates by a virtually all white staff had been a major cause of serious racial violence in the California prison system (Br. 26-30), and that minority supervisors can help shape institutional policies to avoid racial difficulties (Br. 36).

with more employees of a particular race and that the people with whom the agency comes into contact would prefer to communicate with persons of their own race. Race-conscious selection on this ground significantly involves the government in the reinforcement of racial stereotypes and comes perilously close to embracing—however limited and compelling the circumstances—the perceptions and practices that it was the very purpose of the Civil War Amendments and Title VII to eliminate.[24]

We do not urge the Court to conclude that race-conscious action could never be defended against a Fourteenth Amendment challenge on the basis of operational needs. This Court has indicated, for example, that prisoners might be segregated on the basis of race on a temporary basis in extreme circumstances to preserve or restore prison security and discipline in a race-charged atmosphere. *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972); *Lee* v. *Washington*, 390 U.S. 333, 334 (1968). The Superior Court's order recognized that there may be a similar need to assign duties to employees on the basis of their race in particular circumstances (Pet. App. F-6 to F-7). This latitude may well satisfy the Department's desire to have minority guards available to communicate with and air grievances of minority inmates. But this day-to-day flexibility is far different from taking race-conscious measures on a class-wide basis to achieve a particular level of employment for one race because of its asserted desirability in the normal course or for an indefinite period.

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[24] This Court's decision in *Weber* only recognized the authority of an employer under Title VII to adopt temporary race-conscious measures to further the purposes of Title VII of breaking down racial segregation and hierarchy and opening up job opportunities. Thus, whatever may be the latitude of a state under the Fourteenth Amendment, standing alone, we seriously doubt that race-conscious measures adopted solely to further operational needs would be permissible under Title VII, at least in the absence of the type of extreme circumstances suggested in *Lee* v. *Washington*, 390 U.S. 333, 334 (1968), and *Cruz* v. *Beto*, 405 U.S. 319 (1972). There is no occasion to resolve that question here, however, because the state courts were without jurisdiction over the Title VII claims.

Cf. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Korematsu* v. *United States*, 323 U.S. 214 (1944). Only the most compelling of justifications, which we do not believe have been shown on the present record, could support such a practice. Accordingly, in a case such as this, the Court should first consider what measures are appropriate to remedy prior discrimination, for which the temporary use of class-based, race conscious measures is appropriate. Only then, and on a far more particularized and exacting basis than has thus far been developed in the courts below, should the Court consider whether additional measures, not supportable on remedial grounds, might be warranted.[25] The Superior Court can follow this

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[25] Although the validity of the particular goals adopted for minority and female employment is not before the Court (see note 5, *supra*), the Department's establishing of a goal for minority representation in the work force at 70% of the percentage in the inmate population illustrates the difficulty with the operational needs concept. The Department appears to have adopted that goal principally, if not solely, on the belief that LEAA guidelines required that level of minority representation; the Program, as adopted in 1974 and revised in 1975, contains no explanation why that figure should apply to support staff, who have no contact with inmates; why a particular level in excess of the percentage of minorities in the labor market is vital; or why 70% of the representation is significantly preferable to some other figure (Exh. G at 11, 21, 40).

Moreover, the LEAA guidelines did not require such a level of minority employment. They provided only that LEAA would give priority in conducting compliance reviews to recipient agencies in which the disparity between the percentage of minority employees and minority inmates was greater than this 70% figure. 28 C.F.R. 42.306(b) and (c) (1976). Furthermore, LEAA deleted the 70% guideline when it revised its regulations in 1977. LEAA observed that a representative of petitioner CCOA had observed that the reference to inmate population "shifted the principle of equal employment opportunity to 'a notion that race or sex is job-related to the work the employee is performing' " and "sugests that a particu-large percentage of minorities or women in the correctional officer work is somehow required to do an adequate job in guarding and/or supervising the inmates." *Ibid.* LEAA stated that "[*n*]*o empirical evidence supporting this notion was offered to LEAA.*" *Ibid.*; emphasis added. Acocrdingly, LEAA chose to look to the relevant

course on remand, first considering the remedial justification for the Program.

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labor market in testing for discrimination. *Ibid.* This conforms to Title VII principles (see *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 (1977)), which Congress made applicable to the nondiscrimination provisions administered by LEAA when it amended the Omnibus Crime Control and Safe Streets Act in 1976. See H.R. Conf. Rep. No. 94-1723, 94th Cong., 2d Sess. 32 (1976).

Thus, it is the considered judgment of LEAA that an institution's operational needs do not in general require a percentage of minorities in the work force mirroring that in the inmate population. Respondents nonetheless chose to carry forward the 70% goal in the Affirmative Action Program adopted in 1979, a copy of which has been lodged with the Clerk of this Court. Of course, the selection of the 70% goal for employment of minorities in the *future* would not, as petitioners seem to suggest (Pet. Br. 32), undercut the validity of the Department's apparent conclusion that it discriminated against minorities in the *past*.

CONCLUSION

The writ of certiorari should be dismissed. If the writ is not dismissed, the judgment of the Court of Appeal, reversing the Superior Court's injunction prohibiting consideration of race or sex under any circumstances, should be affirmed.

Respectfully submitted.

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NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 332795 138